

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

AMERICAN ATHEISTS, INC.;
BETTY JO FERNAU; CATHERINE
SHOSHONE; ROBERT BARRINGER
and KAREN DEMPSEY,

No. 4:19CV00017 KGB

Plaintiffs,

v.

Tuesday, January 15, 2019
Little Rock, Arkansas
9:00 a.m.

STANLEY JASON RAPERT, in his
individual and official
capacity,

Defendant.

**TRANSCRIPT OF HEARING ON MOTION FOR TEMPORARY RESTRAINING
ORDER/PRELIMINARY INJUNCTION
BEFORE THE HONORABLE KRISTINE G. BAKER,
UNITED STATES DISTRICT JUDGE**

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24 Proceedings reported by machine stenography; transcript
25 prepared utilizing computer-aided transcription.

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P R O C E E D I N G S

THE COURT: Good morning. We are here this morning in Case No. 4:19CV17, American Atheists, Inc.; Betty Jo Fernau; Catherine Shoshone; Robert Barringer and Karen Dempsey versus Stanley Jason Rapert in his individual and official capacity.

Counsel for plaintiffs, if you would, please introduce yourselves, Mr. Kaplan, and the folks that you have with you at the table.

MR. KAPLAN: Yes. Your Honor, Philip Kaplan, Williams & Anderson, and Bonnie Johnson for plaintiffs. I have with me Geoffrey Blackwell, who is counsel at American Atheists. He will shortly be filing a pro hac vice motion. But I did want to introduce him to the Court. And I have Allison Gladden, who is also with me. She is a lawyer with Williams & Anderson and helping with some technical problems.

THE COURT: All right. Thank you, Mr. Kaplan.

Mr. Bronni and Mr. Jacobs, good morning. If you all would, please introduce yourselves and the folks that you have with you.

MR. JACOBS: Thank you, Your Honor. Dylan Jacobs with the Attorney General's Office. With me is Billy Bird and Nicholas Bronni. We represent Senator Rapert in his official capacity.

THE COURT: Thank you.

MR. BYRD: Thank you. Your Honor, this is Paul Byrd.

1 And I represent Jason Rapert in his individual capacity.

2 THE COURT: Good morning. Thank you.

3 All right. We're here today. I appreciate everyone being
4 here today. I know we had back-and-forth email exchanges in an
5 effort to try to set this on a convenient date for everyone,
6 which is hard to do, especially when we have this many folks
7 involved. So I appreciate everyone being here today for the
8 hearing.

9 We are going to take up the motion for temporary
10 restraining order and preliminary injunction and the request for
11 an expedited hearing. It's Docket No. 5 in the case. I will
12 note for the record that a motion to dismiss was filed yesterday
13 on behalf of Senator Rapert in his individual capacity. That
14 motion is not ripe yet. It is Docket No. 11, but I did want to
15 make everybody aware of that filing yesterday. I believe it was
16 yesterday. Is that right?

17 All right. Mr. Kaplan, are you ready to proceed?

18 MR. KAPLAN: I am, Your Honor.

19 THE COURT: And I'm happy if folks want to make
20 argument or if you want to launch into evidence. I will let you
21 set the pace. And you let me know how you wish to proceed.

22 MR. KAPLAN: I think I would make a brief statement,
23 Your Honor.

24 THE COURT: All right. You are welcome to do so
25 either from the table or from the podium. I'm happy either way.

1 MR. KAPLAN: Your Honor, we appreciate the Court's
2 making this early date available to us. And we recognize that,
3 obviously, the issues have not been joined yet. But we have
4 been -- we have supplied the Attorney General's Office with the
5 names of our witnesses. We have supplied the Attorney General's
6 Office with a number of documents, including a list of URLs that
7 support -- and we'll introduce that exhibit shortly -- URLs
8 which support the allegations in the complaint with regard to
9 the functionality of both Facebook and Twitter. So for a large
10 portion of the complaint, we don't think that there is any
11 dispute, because it proceeds directly from those functionality
12 features online for both Facebook and Twitter.

13 We recognize that we have to show standing. We have to
14 show that the damage is actual and imminent, that it's traceable
15 to the defendant's action and that it's likely to be redressed
16 by a favorable decision. The Court, based on what we have
17 alleged in the complaint and cases that we have cited in the
18 complaint, the law has become clear now, it seems to me, that
19 Facebook pages and Twitter accounts now have been determined by
20 the courts to be part of the public fora and that actions taken
21 to impede contact with and comments upon either Facebook or
22 Twitter are in violation of the Constitution's right to freedom
23 of speech and access to political individuals.

24 Senator Rapert's accounts make it clear that these are
25 official positions of his in which he solicits comments from the

1 public. We have three witnesses who have been blocked. We saw
2 an affidavit from him this morning, only this morning, in which
3 he says that he has not blocked anybody. But the three
4 witnesses who will testify shortly will testify that they have
5 been blocked from access either to Twitter or to Facebook. And
6 this morning only one of them has a phone available. And I will
7 just note that the only reason she has her phone here is that
8 they are part of her hearing aid devices. So she was able to go
9 online this morning, and she is still blocked.

10 And we believe that even the affidavit which they seek to
11 introduce this morning substantiates virtually all of our claims
12 that he presents, both his Facebook and his Twitter accounts,
13 that they are under the color of state law, and they are clothed
14 with the authority of state law, and he has taken them in his
15 official status. He has private Twitter accounts, five private
16 Facebook accounts. But these are public. These are pages.
17 These are not the kind of Facebook accounts that many people
18 have, not me, but that many people have in which they are purely
19 private, and you have to be a friend to access those accounts
20 and what appears on those accounts. But these are clearly
21 Senator Jason Rapert accounts.

22 A little later, when we close, I will note that the issue
23 with regard to the motion to dismiss is addressed in every
24 particular in a portion of the Fourth Circuit case that we
25 brought to the Court's attention. It deals exactly with the

1 same issue, where the defendant in that case asserted that,
2 well, this is just my individual private account, and therefore
3 I should be dismissed in my individual capacity, seeking to
4 overturn the trial court. And the Court of Appeals for the
5 Fourth Circuit addressed that issue and sustained the trial
6 court with regard to the finding that that -- that the motion or
7 at least the request to reverse the trial court was not an
8 appropriate item.

9 At any rate, this is a public fora, it seems, also is
10 beyond dispute. President Trump tried to make that assertion in
11 the *Knight v. Trump* case. And although that case is on appeal,
12 there are many cases which make it clear that items or functions
13 such as Facebook and Twitter are in the public forum now beyond
14 dispute. This is, obviously, something with so many millions,
15 hundreds of millions of people, who use Twitter and Facebook.
16 It's the new way for or at least a major new way for people to
17 address issues of public concern.

18 At any rate, we wish that he would have been here so that
19 the Court could have heard about what both his Facebook page and
20 his Twitter accounts are all about. But we are ready to proceed
21 with three witnesses who themselves have been blocked.

22 THE COURT: All right. Counsel for Senator Rapert.

23 MR. JACOBS: Thank you, Your Honor. As my friend on
24 the other side mentioned, we think this case on the merits comes
25 down to the easy assertion that this is Jason Rapert's private

1 social media accounts that he operates in his capacity as a
2 private citizen. We think the plaintiffs cannot marshal any
3 sort of evidence today that's going to bring them anywhere near
4 the evidentiary record that was before the courts in the couple
5 of other cases that they cited. I think we'll have more to say
6 on that after we hear what the evidence is, of course.

7 As far as the factors for preliminary injunction, upfront I
8 would like to mention, as the Court is aware, this case was
9 originally filed back in October, a similar version of this
10 case. Plaintiffs had 90 days to serve their complaint on the
11 defendant. They didn't do that. The defendant filed a motion
12 to dismiss for failure to serve. And in response, plaintiffs
13 voluntarily nonsuited their case. And then they refiled, this
14 time asking for extraordinary relief that, one, they didn't ask
15 for the first time around or alleging irreparable harm that, as
16 we think the evidence will show today, if the harm occurred,
17 it's occurred a long time in the past.

18 I think in the complaint many of the plaintiffs allege that
19 they were blocked from Senator Rapert's social media profiles
20 years ago and have only elected to bring suit recently and have
21 only elected to ask for injunctive relief as late as last week.
22 So we think that belies any notion that they have suffered
23 irreparable harm and that the balance of equities in this case
24 weighs strongly in favor -- weighs strongly against granting any
25 injunctive relief on that basis alone. The Eighth Circuit has

1 made this clear at least as recently in the *McGehee* case, where
2 delay in asking for injunctive relief is enough in itself to
3 deny that injunctive relief. We think that rings true today.

4 Unless the Court has any questions on the merits, we'll
5 save our argument for after the evidence.

6 THE COURT: All right. Thank you, Mr. Jacobs.

7 Mr. Byrd.

8 MR. BYRD: Thank you, Your Honor. My position is
9 pretty simple, and it's kind of laid out in my brief. I'm here
10 in his individual capacity. I certainly believe if he is
11 supposed to be here individually, then it's his individual page.
12 It can't be -- both arguments can't be true.

13 I think the Fourth Circuit case, you are going to over time
14 see that there are some distinctions, very important factual
15 distinctions. We laid it out in Mr. Rapert's affidavit, some of
16 the differences. As I understand it, the person in the Fourth
17 Circuit case used staff people to work the page and what have
18 you, and that's not the case here. It's totally his own page.

19 I think it's kind of interesting that some of the TRO asks
20 for some very dramatic things about curtailing Mr. Rapert's
21 speech. I think our Honorable Wendell Griffen has shown us that
22 even judges have a right to freedom of speech. So some of it is
23 overreaching for sure. But I basically am here to stand on my
24 motion. Thank you.

25 THE COURT: All right. Thank you, Mr. Byrd.

1 Mr. Kaplan, are we ready to proceed with the evidence?

2 MR. KAPLAN: Yes. I'm sorry, Your Honor.

3 THE COURT: That's all right.

4 MR. KAPLAN: Karen Dempsey.

5 THE COURT: Ms. Dempsey, the witness stand is here
6 next to me.

7 **KAREN DEMPSEY, PLAINTIFFS' WITNESS, DULY SWORN**

8 **DIRECT EXAMINATION**

9 BY MR. KAPLAN:

10 Q. Tell me your name and your address, please.

11 A. Karen Dempsey, 1306 North Flamingo Road, Rogers, Arkansas,
12 72756.

13 Q. You are not a constituent of Jason Rapert. Is that
14 correct?

15 A. I am not in his constituency.

16 Q. You live in northwest Arkansas?

17 A. Yes, I do.

18 Q. How long have you lived in Arkansas?

19 A. Over four years.

20 Q. Okay. And have you followed Mr. Rapert or Senator Rapert
21 in the past on his Facebook page?

22 A. Yes, I have.

23 Q. Tell me a bit about your education, please.

24 A. I graduated from high school. I went to college several
25 times, but I didn't complete it. That's it.

1 Q. And your employment, are you employed now?

2 A. I retired last year.

3 Q. And what did you retire from?

4 A. I owned my own company in New Jersey for 21 years called
5 Precision Inspection Services, Inc.

6 Q. Okay. Are you a supporter of the American Atheists
7 organization?

8 A. Yes, I am.

9 Q. And do you use social media?

10 A. Yes, I do.

11 Q. How long have you had a Facebook account?

12 A. Several years.

13 Q. And you've told us that you followed Senator Rapert. Why
14 did you follow him or any other politician?

15 A. Well, I followed Asa Hutchinson because he was governor,
16 but I followed Senator Rapert when I got involved with the bill
17 that was passed requiring that the United States motto, "In God
18 We Trust," be put on posters and placed in classrooms all over
19 Arkansas. The posters that were originally donated to Arkansas
20 schools were organized and donated through Senator Rapert, and
21 they did not meet the requirements of the bill, so American
22 Atheists had posters printed that met the requirements of the
23 bill. And I got involved in donating or trying to donate those
24 posters, specifically to the Bentonville School District first,
25 and in hopes of getting them all sent out to the other schools.

1 So that's how I first heard about them.

2 Q. Ms. Dempsey, shortly, on your screen you are going to see
3 an exhibit which I've marked for purposes of identification as
4 Karen Dempsey Exhibit No. 1. I'll provide a hard copy.

5 A. I'm sorry. I touched the screen. I didn't know it would
6 make a mark.

7 Q. Can you see this on your screen?

8 A. Yes, I can.

9 Q. Can you identify it?

10 A. This is a direct message to Senator Rapert from me that I
11 sent to him on his Facebook page. When you are following the
12 page for somebody, Senator Rapert had set up the opportunity to
13 interact with him directly by sending him a private message.
14 And that's what I did.

15 Q. All right. Now, what did he post to which you reacted?

16 A. He posted -- you can't see the link here, but you can see
17 the back of whatever it is, some kind of -- one piece of our
18 American currency, where it says, "In God We Trust."
19 Apparently, there was a lawsuit that -- I don't know because the
20 link is missing. But he posted that it was a wonderful decision
21 because they couldn't remove "In God We Trust." So I wrote to
22 him directly.

23 Q. And he mentions that he had been advised my opponent is a
24 public member of an atheist group, Conway Freethinkers, and
25 American Society of Freethinkers. Are you aware of those

1 groups?

2 A. The American Society of Freethinkers, yes. The Conway
3 Society of Freethinkers, yeah.

4 Q. All right. And are those both groups affiliated with the
5 American Atheist organization?

6 A. I don't know. I'm not a member of those groups.

7 Q. Okay. And --

8 A. I might be like following the first one.

9 Q. And what did you post in response? Is that also on
10 Exhibit 1?

11 A. No. All that's on Exhibit 1 is the question that I asked
12 him. I asked him: "Do you want to keep the government secular,
13 or do you want America to become a Christian nation?"

14 Q. All right.

15 A. And you can't see his response or my response on this
16 slide.

17 Q. All right. But you did make a comment asking him
18 questions. Is that correct?

19 A. He responded to my question, and then I responded to his
20 response.

21 Q. All right. Are they on Exhibit 1, or are they on some
22 other documents which we're going to introduce?

23 A. They are on other documents, because you can't see the
24 whole thread. It's called a thread, where you keep going.

25 Q. All right. I'm going to show you some additional ones.

1 MR. KAPLAN: Your Honor, we would offer Exhibit 1.

2 THE COURT: Any objection from defense?

3 MR. BIRD: No objection, Your Honor.

4 THE COURT: All right. Exhibit 1 will be admitted.

5 (Plaintiffs' Exhibit 1 received in evidence.)

6 BY MR. KAPLAN:

7 Q. 2. You will shortly see in front of you a document which
8 I've marked for purposes of identification as Exhibit No. 2.
9 Can you identify that document?

10 A. This is a post -- not a private post. This is a post on
11 his -- on Senator Rapert's page that I made in response to the
12 "In God We Trust" motto on currency deemed constitutional by a
13 court after atheists complained. So he posted about the win,
14 and I posted about his post about the win.

15 MR. KAPLAN: Okay. Your Honor, we would offer No. 2.

16 THE COURT: Any objection?

17 MR. BIRD: No objection, Your Honor.

18 MR. KAPLAN: Let me show you a document which I've
19 marked for purposes of identification as No. 3.

20 THE COURT: Mr. Byrd -- hold on just one minute. You
21 are right. Flip that around, and you should be able to see the
22 exhibits. If you have trouble at any point seeing them on the
23 monitor, please let me know.

24 MR. KAPLAN: I'm sorry, Your Honor.

25 THE COURT: You are all right. He had his monitor

1 flipped the other way, flipped to opposing counsel's table, so
2 he was not seeing these.

3 And I don't know that I ruled on Exhibit 2. Was there any
4 objection?

5 THE WITNESS: Do I need to read this? Do I need to
6 read this?

7 MR. KAPLAN: Yes. Go ahead.

8 THE COURT: Was there any objection to Exhibit 2?

9 MR. BIRD: There was none, Your Honor.

10 THE COURT: I'll admit Exhibit 2. You may proceed.

11 (Plaintiffs' Exhibit 2 received in evidence.)

12 THE WITNESS: What I wrote to Senator Rapert -- thank
13 you -- "As an atheist, please understand, I am not opposed to
14 people who believe in gods. I understand that their faith is
15 important to them, and I defend their right to practice their
16 religion. I have issue with people like you denigrating people
17 with a different philosophy on life. We are not evil. We are
18 moral, ethical citizens of our country. We don't like being
19 told we are less than, second-class citizens. The government
20 was set up as secular so that all people would be equal. Please
21 don't diminish others in order to make yourself look good.
22 Every class, race and belief of people contains a bad element,
23 such is human nature. Why do you feel the need to be mean
24 spirited to others? Why are you so prejudiced?

25 MR. KAPLAN: All right. Your Honor, we've already

1 offered No. 2.

2 THE WITNESS: I can't hear you.

3 BY MR. KAPLAN:

4 Q. I show you a document which I've marked for purposes of
5 identification as No. 3 and ask you if you can identify that
6 document.

7 A. Speak up for me.

8 THE COURT: I think she's having a little trouble
9 hearing you, Mr. Kaplan. If you would, you might pull that
10 microphone closer to you. That's one of the problems with the
11 evidence cart. We're limited by the number of microphones on
12 it.

13 BY MR. KAPLAN:

14 Q. Can you identify No. 3?

15 A. I don't have Slide No. 3 in front of me.

16 Q. Yes. It looks the same, except on the right-hand side
17 there's something in blue. Do you see that?

18 A. Oh, yes. That is the personal correspondence through his
19 Facebook page. He has a link where you can write to him
20 directly, so I wrote to him directly. And that is the beginning
21 of a personal conversation that was between him and I.

22 Q. Okay. Let me show you a document which I've marked for
23 purposes --

24 MR. KAPLAN: Your Honor, we would offer No. 3.

25 THE COURT: Any objection to No. 3?

1 MR. BIRD: No. 3 is the same document but just pointed
2 to a different portion. Is that correct?

3 MR. KAPLAN: It just has the part in blue on the
4 right.

5 THE COURT: I think it is different. It is a
6 different document. It looks a lot like Exhibit 1, but the
7 message, where Ms. Dempsey just read, appears on Exhibit 3.

8 MR. BIRD: Okay. No objection.

9 THE COURT: Mr. Byrd, any objection?

10 MR. BYRD: No objection.

11 THE COURT: 3 will be admitted.

12 (Plaintiffs' Exhibit 3 received in evidence.)

13 BY MR. KAPLAN:

14 Q. Let me hand you a document. I want No. 5, which I've
15 marked for -- I'm skipping No. 4.

16 THE COURT: All right.

17 BY MR. KAPLAN:

18 Q. I'm marking No. 5, and I ask you if you can identify that
19 document. Can you identify that document?

20 THE COURT: Can you identify the document?

21 THE WITNESS: I have the same document in front of me,
22 but it's scrolled further down.

23 THE COURT: And because of the limitation of our
24 pages, that's a different document. I understand when you see
25 it on the screen, it may be a thread. But this is a different

1 exhibit.

2 THE WITNESS: Okay. This is a continuation of the
3 public post that I just read. And other people that follow him
4 commented on it.

5 BY MR. KAPLAN:

6 Q. All right. Why are you interested in seeing the entire
7 thread of people who comment on your comments as well as his
8 original posts?

9 A. I couldn't understand the question. Could you speak into
10 the microphone?

11 Q. Are you interested in seeing these comment threads?

12 A. Yes, I am.

13 Q. And why?

14 A. People have different opinions. I think it's important to
15 hear other people's opinions. I think the more exposure we have
16 to other people's opinions provides a basis for tolerance and
17 acceptance. If you don't know what the other people are
18 thinking, you are at a great loss in any conversation. So it's
19 important to me to be part of the dialogue even if it doesn't
20 agree with me. I also like the opportunity to present how I
21 think about things to people who don't think like me so that
22 they have the opportunity to see that I exist.

23 MR. KAPLAN: Okay. Your Honor, we would offer No. 5.

24 THE WITNESS: I can't hear you.

25 MR. KAPLAN: We would offer No. 5.

1 THE COURT: Any objection?

2 MR. BIRD: No objection, Your Honor.

3 THE COURT: Mr. Byrd, any objection?

4 MR. BYRD: No objection, Your Honor.

5 THE COURT: Exhibit 5 will be admitted.

6 (Plaintiffs' Exhibit 5 received in evidence.)

7 MR. KAPLAN: 6.

8 THE WITNESS: I'm turning this up. Maybe that will
9 help.

10 THE COURT: All right. If you can't hear, please just
11 let us know. We'll try to make what accommodations we can.

12 BY MR. KAPLAN:

13 Q. Ms. Dempsey, I now have put in front of you a document
14 which I've marked for purposes of identification as No. 6. Can
15 you identify this document?

16 A. This is a continuation on the post we were just discussing
17 with more entries on the thread.

18 Q. I'm going to skip for just a second. I'm going to show you
19 some more. But can you -- do you now have access to make
20 comments on Senator Rapert's page?

21 A. No.

22 Q. What happened?

23 A. There's a term. It's called "blocked." So the owner of
24 the page can decide not to let you participate on the page, and
25 they block you. So you can see the page, but you can't comment.

1 Q. And can you see the thread also?

2 A. Yes. You can see the thread of things you have not
3 participated in. So if Senator Rapert makes a comment and other
4 people comment on that, I can follow what the other people are
5 saying, but I can't participate.

6 Q. Did you try this morning to get on to make a comment?

7 A. Yes, I did.

8 Q. And were you able to?

9 A. No. I was still blocked.

10 Q. And how do you know that you were still blocked?

11 A. The ability to make a comment isn't there. There is a
12 specific little box that shows up where you can type in your
13 comment, and that box isn't there.

14 MR. KAPLAN: Okay. No. 7, please. Let me hand you a
15 document -- Your Honor, we would offer No. 6.

16 THE COURT: Any objections to 6?

17 MR. BIRD: None.

18 THE COURT: Mr. Byrd?

19 MR. BYRD: No objection.

20 THE COURT: 6 will be admitted.

21 (Plaintiffs' Exhibit 6 received in evidence.)

22 BY MR. KAPLAN:

23 Q. Can you identify for us the document in front of you, No.
24 7?

25 A. Yes.

1 Q. What is this?

2 A. This is a screenshot of a partial interaction where I
3 responded to something Senator Rapert had posted.

4 Q. Okay. And where is your comment? Is it at the bottom?

5 A. About halfway down, it starts.

6 Q. Okay.

7 A. And it starts with my name in blue, so it becomes pretty
8 obvious.

9 Q. And what did you post this time?

10 A. "You get into office, and you work with the party of your
11 choice. But once in office, you should represent all the
12 people, not just the ones that agree with you."

13 Then my next post says: "The particular statute you
14 reference removes the freedom to protest against Israel via
15 boycott. Why does the country" --

16 Q. Let me stop you right there. Would you look at his post at
17 the very top so that we have context?

18 A. I see. Okay.

19 Q. And what does he say?

20 A. He says: "Today at the Arkansas Code Revision Commission
21 meeting, I had to endure an ACLU attorney and liberal activist
22 attorney attacking an Arkansas statute passed to protect and
23 honor Israel. Oh, by the way, they are very active Democrats,"
24 all in capital letters, "Democrats. Don't vote for Democrats."

25 Q. All right. And this post that you were reading to us is in

1 direct response to -- this comment that you were reading to us
2 is in direct response to his post at the top of the page. Is
3 that correct?

4 A. That is correct.

5 MR. KAPLAN: Okay. Your Honor, we would offer No. 7.

6 THE COURT: Any objection?

7 MR. BIRD: No objection.

8 MR. BYRD: No objection, Your Honor.

9 THE COURT: All right. Exhibit 7 will be admitted.

10 (Plaintiffs' Exhibit 7 received in evidence.)

11 BY MR. KAPLAN:

12 Q. Let me hand you a document which I've marked for purposes
13 of identification as No. 8, which will be on the screen -- now
14 is on the screen. And can you identify that document?

15 A. Yes.

16 Q. Would you identify it for us, please.

17 A. This is a blowup of the private message that I sent to
18 Senator Rapert and his response to that query that I made of
19 him.

20 Q. Was this on the Facebook page that we've seen before, the
21 Senator Rapert page?

22 A. It wasn't part of the public part of the page. It was
23 on -- it was through his page that he has the opportunity to
24 dialogue with him personally, so this is like a private chat
25 session between the senator and I that doesn't get posted

1 publicly.

2 Q. But it's through that same page. Is that correct?

3 A. That is correct.

4 Q. All right. And what's the discussion about? You don't
5 have to read everything to us. Just tell us what the discussion
6 is about on Exhibit No. 8.

7 A. I had asked him if he wanted America to remain a secular
8 government or did he want it to become a Christian nation, and
9 he responded to that. And I responded to his response.

10 MR. KAPLAN: Your Honor, we would offer No. 8.

11 THE COURT: Any objection?

12 MR. BIRD: No objection.

13 MR. BYRD: No objection, Your Honor.

14 THE COURT: Exhibit 8 will be admitted.

15 (Plaintiffs' Exhibit 8 received in evidence.)

16 BY MR. KAPLAN:

17 Q. Let me show you No. 9. Can you identify No. 9, please.

18 A. Yes. This is -- the blue part is my response to Senator
19 Rapert regarding the question I had sent him. This is part of
20 the personal chat that is through his web page. There are
21 actually three boxes in my response. This shows the first box
22 and part of the second box.

23 Q. In blue, is that your response?

24 A. Yes.

25 MR. KAPLAN: Your Honor, we would offer No. 9.

1 THE COURT: Any objection?

2 MR. BIRD: No objection.

3 MR. BYRD: No objection.

4 THE COURT: Exhibit 9 will be admitted.

5 (Plaintiffs' Exhibit 9 received in evidence.)

6 BY MR. KAPLAN:

7 Q. Now let me show you No. 10. And can you identify No. 10?

8 A. Yes.

9 Q. Please identify for the Court No. 10.

10 A. This is a screenshot showing the response in the private
11 chat thread that I made to Senator Rapert, including the partial
12 box number one in blue and the balance of my response, box
13 number two in blue, and box number three in blue. So all of
14 those blue boxes are part of my response.

15 Q. After this response, did you get any further comments from
16 him or posts from him?

17 A. No.

18 Q. What happened after you made these comments?

19 A. I was blocked.

20 Q. And how did you learn you were blocked?

21 A. I went on his page to participate, and I couldn't.

22 Q. And have you tried since then to engage him on his page?

23 A. Several times. I have gone back to see if I've been
24 unblocked as a function of him knowing about this action that's
25 being taken.

1 Q. And at any point since then, including this morning, have
2 you been able to engage him by commenting on his posts?

3 A. No. And this is not that old. This was last September,
4 last August and September. So it's not old. And I've been
5 trying to participate.

6 MR. KAPLAN: Your Honor, we would offer No. 10.

7 THE COURT: Any objections?

8 MR. BIRD: No objection.

9 MR. BYRD: No objection.

10 THE COURT: Exhibit 10 will be admitted.

11 (Plaintiffs' Exhibit 10 received in evidence.)

12 MR. KAPLAN: That's all I have, Your Honor, of this
13 witness.

14 THE COURT: All right.

15 CROSS-EXAMINATION

16 BY MR. BIRD:

17 Q. Good morning, Ms. Dempsey.

18 A. Good morning.

19 Q. You testified a minute ago that Senator Rapert does not
20 represent you in terms of you living in his district. Correct?

21 A. I don't live in his district. He represents me as a state
22 senator, so therefore he makes decisions that affect the entire
23 state, and therefore it affects me.

24 Q. I understand. You don't live in District 35.

25 A. Nope.

1 Q. You are -- I think you testified you are involved with the
2 American Atheists in Arkansas. Correct?

3 A. Correct.

4 Q. In the complaint, there's an allegation that that group
5 sent a letter to Jason Rapert in July of last year. Are you
6 aware of that letter?

7 A. No. You need to understand, I'm a member of the American
8 Atheists, and I volunteer as one of the assistant state
9 directors for American Atheists in Arkansas. But as a
10 volunteer, I'm not privileged to everything they do. So
11 sometimes they send me things. I may have received it. In all
12 honesty, I don't remember.

13 Q. And my question was simply were you involved in the
14 preparation of that letter that went out last year?

15 A. I would not -- I would remember if I prepared something.

16 No. I think I would.

17 Q. Is it true from your testimony and from the allegations in
18 the complaint that you first interacted with Mr. Rapert in
19 August of last year?

20 A. Thereabouts, I would say. It could be a little earlier.
21 It could be right about August of last year.

22 Q. The exhibits that Mr. Kaplan walked you through all related
23 to some interactions that occurred on the Facebook page. And I
24 think if we -- can you bring up Exhibit 1, please?

25 If we look at the post that is at the top of that page,

1 August 29, do you see that?

2 A. Yeah.

3 Q. Okay. That would be August of 2018. Is that a fair
4 representation of that?

5 A. Correct.

6 Q. Okay. There's an allegation in the complaint, paragraph
7 64, that staff are involved in maintaining Mr. Rapert's social
8 media accounts. You don't have any personal knowledge of that
9 fact, do you?

10 A. No, sir.

11 Q. If we look at Exhibit 1, up on the very top of that page,
12 do you see what -- I guess what I would describe, it looks kind
13 of like a campaign sticker up at the top?

14 A. Correct.

15 Q. And that says "Re-elect Senator Jason Rapert." Correct?

16 A. Correct.

17 Q. If we scroll to -- look at Exhibit 2, please. If we look
18 down the right side of this page, in the "about" box, what is
19 the website that is linked in the "about" section?

20 A. I'm sorry. I couldn't make out your question.

21 Q. If you look on Exhibit 2, which is pulled up on the screen,
22 on the right side of the page, there is an "about" section.
23 Read what the website is that's linked on this page.

24 A. All right. On the right side of the page, there is
25 something. And you want me to read it. What is it?

1 Q. The website.

2 A. www.jasonrapertforsenate.com.

3 Q. Ms. Dempsey, do you have -- I think the allegations in the
4 complaint with regard to you are limited to Facebook
5 interactions. Is that fair?

6 A. That is correct.

7 Q. Okay. Do you have a Twitter account?

8 A. I do, but I set it up years ago. Then I realized I don't
9 have any interest in Twitter.

10 Q. So it's not something you actively use?

11 A. No.

12 MR. BIRD: Pass the witness, Your Honor.

13 MR. KAPLAN: No further questions. May this witness
14 be excused?

15 MR. BYRD: Just one question.

16 CROSS-EXAMINATION

17 BY MR. BYRD:

18 Q. Hello.

19 A. Hi.

20 Q. I'm Paul Byrd. We haven't met. You have used your Twitter
21 account to reach Jason Rapert before, though. Correct?

22 A. I used the Facebook account to reach out to Senator Rapert.
23 I don't know if you said Twitter or Facebook.

24 Q. Twitter.

25 A. No. I've never used Twitter.

1 Q. You've never once used Twitter to reach --

2 A. No, not regarding Senator Rapert, and I've probably made
3 one tweet in my whole life. I don't know. It was a zillion
4 years ago. And I have no interest in Twitter. I'm not part of
5 that.

6 Q. Do you keep up with the Freedom From Religion Foundation on
7 Twitter?

8 A. No. I don't keep up with anyone on Twitter.

9 Q. That's all I have. Thank you.

10 A. I only use Facebook.

11 Q. Thank you.

12 A. All right.

13 Q. So it's clear, you've not tried to reach Jason Rapert on
14 Twitter.

15 A. Correct.

16 MR. BYRD: Thank you.

17 MR. KAPLAN: Nothing further, Your Honor.

18 THE COURT: All right. May this witness step down?

19 Mr. Byrd?

20 MR. BIRD: Yes.

21 THE COURT: Mr. Byrd, may she step down?

22 MR. BYRD: Yes.

23 THE COURT: You may step down.

24 MR. KAPLAN: Cathey Shoshone, please.

25 CATHERINE SHOSHONE, PLAINTIFFS' WITNESS, DULY SWORN

1 DIRECT EXAMINATION

2 BY MR. KAPLAN:

3 Q. Tell me your name and address, please.

4 A. My name is Catherine Shoshone. My address is 10 Oak Forest
5 Drive, Maumelle, Arkansas, 72113.

6 Q. And you are not a constituent. You do not reside in
7 Senator Rapert's district. Is that correct?

8 A. Correct.

9 Q. Tell me a bit about your education, please.

10 A. Uh-huh. I have my medical technology training through the
11 Air Force from 1996, and then I have a bachelor's degree in
12 psychology from UCA in about 2002.

13 Q. Are you employed, Ms. Shoshone?

14 A. I am.

15 Q. And how are you employed, and where are you employed?

16 A. I'm a medical technologist, and I work at Arkansas Heart
17 Hospital.

18 Q. How long have you been there?

19 A. About seven years.

20 Q. Do you use social media?

21 A. I do.

22 Q. And what form of social media do you use?

23 A. I have Facebook and Twitter. Also, I have a Reddit
24 account.

25 Q. How long have you had the Facebook account?

1 A. About 10, 11 years.

2 Q. And how about Twitter?

3 A. About four or five years.

4 Q. Do you correspond with or follow Senator Jason Rapert
5 either on Facebook or on Twitter?

6 A. Yes, sir.

7 Q. Which or both?

8 A. Facebook and Twitter.

9 Q. And are you now able to follow him on either of those?

10 A. I have not on Facebook. I have not. On Twitter, I have
11 two accounts. And one of those has been blocked, and the other
12 one has not.

13 Q. Okay. We're going to get to the blocked account in just a
14 minute. Do you follow other Arkansas politicians?

15 A. I do.

16 Q. And why do you follow these politicians?

17 A. To keep up with the bills that they are filing and laws
18 that they are passing.

19 Q. And who do you follow?

20 A. I follow a lot. I follow my own state representative, Mark
21 Lowery. And I follow Asa Hutchinson and a lot of other state
22 representatives and, of course, our senators and representatives
23 to federal Congress as well.

24 Q. Okay. Let me show you a document which I'm going to mark
25 as Exhibit 11 and ask you if you can identify this document.

1 A. Yes, sir. This is on Twitter. And I went to the ALC,
2 which is Arkansas Legislative Committee or something. And he
3 gave a big speech about same-sex marriage because it was a big
4 deal at the time. And he threw out a lot of statistics that I
5 believed were false, and I asked that he would share his sources
6 on any of those statistics.

7 Q. Did he respond to your question --

8 A. No.

9 Q. -- asking --

10 A. No.

11 Q. At the top of No. 11, could you tell us -- read us his
12 comment to his post.

13 A. At the top of this screen?

14 Q. Yes.

15 A. Okay. "2 Chronicles 36:16." I'm sure I said that wrong.
16 "But they mocked the messengers of God and despised his words
17 and misused his prophets until" -- and then he gave a link to a
18 website.

19 Q. And was this on a private Twitter account of his or a
20 public?

21 A. I don't think so, no. I don't think I've ever followed any
22 of his private accounts.

23 MR. KAPLAN: Okay. Your Honor, we would offer No. 11.

24 THE COURT: Any objection?

25 MR. BIRD: No objection.

1 MR. BYRD: No objection.

2 BY MR. KAPLAN:

3 Q. Let me show you a document which I'm marking for purposes
4 of identification as No. 12.

5 THE COURT: Exhibit 11 is admitted.

6 (Plaintiffs' Exhibit 11 received in evidence.)

7 BY MR. KAPLAN:

8 Q. And can you identify that document?

9 A. Yes, sir. This is another Twitter post he had posted.
10 Another representative, "David Meeks verified details. My
11 Democrat opponent, Tyler Pearson, took a thousand dollars in
12 blood money from baby killers. Wow."

13 I said that was interesting because he had accepted over
14 \$3,000 from the tobacco industry. And I felt that was
15 hypocritical because the tobacco industry directly kills people.

16 Q. Did he respond to you there?

17 A. Not that I recall.

18 MR. KAPLAN: Your Honor, we would offer No. 12.

19 THE COURT: Any objection?

20 MR. BIRD: No objection.

21 MR. BYRD: No objection, Your Honor.

22 THE COURT: Exhibit 12 is admitted.

23 (Plaintiffs' Exhibit 12 received in evidence.)

24 BY MR. KAPLAN:

25 Q. Let me hand you a document which I've marked as No. 13 and

1 ask you if you can identify that document.

2 A. Yes, sir. He says: "My opponent, Tyler Pearson, takes
3 money from abortion doctors who kill little babies just like
4 this."

5 Then I commented that he could support easy access to birth
6 control to slow down abortion. And this was actually a
7 continuation of a conversation that we had in public where we
8 had discussed the fact that if they allowed mandated sex
9 education in schools and easy access to birth control, that
10 would lower abortion rates.

11 Q. Did he respond to you there?

12 A. I don't think so.

13 MR. KAPLAN: Your Honor, we would offer No. 13.

14 THE COURT: Any objection?

15 MR. BIRD: No objection.

16 MR. BYRD: No objection, Your Honor.

17 THE COURT: Exhibit 13 is admitted.

18 (Plaintiffs' Exhibit 13 received in evidence.)

19 BY MR. KAPLAN:

20 Q. Let me show you a document which I'm marking for purposes
21 of identification as No. 14 and ask you if you can identify this
22 document.

23 A. Yes, sir. They are discussing religious persecution upon
24 Christians. And I asked him for an example, one example of
25 religious persecution on Christians.

1 Q. Did you get a response?

2 A. I don't think I did.

3 MR. KAPLAN: Your Honor, we would offer No. 14.

4 THE COURT: Any objection?

5 MR. BIRD: No objection.

6 MR. BYRD: No objection, Your Honor.

7 THE COURT: Exhibit 14 is admitted.

8 (Plaintiffs' Exhibit 14 received in evidence.)

9 BY MR. KAPLAN:

10 Q. Let me show you a document which I've marked for purposes
11 of identification as No. 15 and ask you if you can identify this
12 document.

13 A. Yes, sir. He was making fun of President Obama, who he was
14 often critical of, taking a selfie. And I reposted a picture of
15 his that he had posted earlier where he is, obviously, taking a
16 selfie. But, of course, I did the writing on the page and not
17 him.

18 Q. Did you receive a response to this?

19 A. Not that I recall.

20 Q. What happened after you sent this comment?

21 A. He blocked me on Twitter.

22 Q. And how did you learn that you were blocked?

23 A. Because if you go to Twitter and go to his page, then it
24 says that I am blocked and can't see any of his posts.

25 Q. And have you tried to access his Twitter since then?

1 A. Yes.

2 Q. And do you recall the last time that you attempted to --

3 A. I believe yesterday.

4 Q. I'm sorry?

5 A. Yesterday.

6 Q. Yesterday?

7 A. Uh-huh. I'm still blocked.

8 Q. And what happened yesterday when you tried to access his
9 Twitter?

10 A. I was still blocked.

11 Q. Okay. Do you want to be able to continue to have this
12 dialogue with Senator Rapert?

13 A. Yes, sir.

14 Q. Why?

15 A. Because he makes laws that affect me and people I care
16 about.

17 Q. And do you have -- with some of the other politicians,
18 public officials that you follow, do you have the same kind of
19 back and forth with any of them?

20 A. Some of them, yes.

21 Q. Have you been blocked by anybody else?

22 A. No, sir.

23 Q. And are your posts with other public officials of the same
24 nature as the posts or the comments that you make to Senator
25 Rapert?

1 A. Yes, sir.

2 MR. KAPLAN: I can't remember if I offered No. 15.

3 THE COURT: You did not.

4 MR. KAPLAN: I offer No. 15.

5 THE COURT: Any objection to No. 15?

6 MR. BIRD: No objection.

7 MR. BYRD: No objection, Your Honor.

8 THE COURT: Exhibit 15 is admitted.

9 (Plaintiffs' Exhibit 15 received in evidence.)

10 MR. KAPLAN: That's all I have of this witness, Your
11 Honor.

12 THE COURT: All right. Cross-examination?

13 CROSS-EXAMINATION

14 BY MR. BIRD:

15 Q. Good morning, Ms. Shoshone. Your testimony was that with
16 regard to Facebook, you were blocked in May of 2014. Is that
17 correct?

18 A. I believe so, yes.

19 Q. You agree with me that was more than four years ago?

20 A. Yes, sir.

21 Q. In terms of when you filed the complaint, more than four
22 years before you filed the complaint?

23 A. Yes, sir.

24 Q. Okay. Your allegation also with regard to Twitter is that
25 you were blocked in February of 2015. Is that correct?

1 A. Yes, sir.

2 Q. And you agree with me that's more than three years from the
3 time that you filed your complaint in this matter. Correct?

4 A. Yes, sir.

5 Q. I want to go to Exhibit 15. Exhibit 15 is on the screen.
6 And I think your testimony was is that it was after this post
7 that you were blocked. Is that correct?

8 A. Yes, sir.

9 Q. Do you recall whether or not you made any other posts after
10 this?

11 A. I do not recall. I do not recall. I know it was about ten
12 days later that I was blocked.

13 Q. About ten days later?

14 A. Uh-huh.

15 Q. So there's a gap of at least ten days, or your testimony is
16 there was a gap of ten days between the time you posted this and
17 the time you were blocked. You don't have any way of knowing in
18 terms of Senator Rapert's mindset in terms of why he blocked
19 you, do you?

20 A. I do not.

21 Q. Okay. Because there was a gap in time, you admit, between
22 the time that you posted this and the time he blocked you.
23 Correct?

24 A. Yes, sir.

25 Q. If we go to Exhibit 12, Exhibit 12, this is on the Senator

1 Jason Rapert, the Jason Rapert Twitter account. Correct?

2 A. Yes, sir.

3 Q. This was an exchange you had with him in 2014?

4 A. Yes, sir.

5 Q. The issues that are being discussed in his post that led to
6 your reply has to do with his opponent in a campaign. Correct?

7 A. Yes, sir.

8 Q. So these matters that we're talking about in Exhibit 12,
9 these are campaign issues, issues with his opponent. That's
10 what drew your reaction, and that's what that exchange was
11 about. Correct?

12 A. Yes, sir.

13 Q. Okay. If we look at Exhibit 13, again, the initial tweet
14 is about his opponent and funding for his campaign, those types
15 of issues. Again, you agree with me this is about campaign
16 issues. Correct?

17 A. Yes, sir.

18 Q. You have two Twitter accounts. I think that's correct?

19 A. Yes, sir.

20 Q. One of those has been blocked. The other has not. Is that
21 right?

22 A. Correct.

23 Q. Have you had any interactions with Jason Rapert --

24 A. I commented a few times, but I have tried not to.

25 Q. Let me finish my question, not because I care, but just for

1 the court reporter so she can make sure she gets it. Have you,
2 to your knowledge, had any interactions with Jason Rapert via
3 your other Twitter account?

4 A. I have.

5 Q. Okay. And how recently did you have interactions with him?

6 A. I don't remember. Within the last six months.

7 Q. Okay. And is it correct that that Twitter handle is
8 @reesesqueen?

9 A. Yes.

10 Q. Are you familiar with a Facebook page, Arkansans Against
11 Jason Rapert?

12 A. I am.

13 Q. Are you an administrator of that page?

14 A. Yes.

15 Q. Do you recall getting a join request from Jason Rapert to
16 that page?

17 A. Yes.

18 Q. Did you accept that join request?

19 A. No, I did not.

20 Q. Okay.

21 MR. BIRD: Pass the witness, Your Honor.

22 MR. BYRD: He asked everything I would, Your Honor.

23 THE COURT: All right. Any redirect?

24 MR. KAPLAN: No redirect, Your Honor. May this
25 witness be excused?

1 THE COURT: May she be excused, Mr. Bird?

2 MR. KAPLAN: May I ask just one other question? I'm
3 sorry.

4 THE COURT: You may.

5 REDIRECT EXAMINATION

6 BY MR. KAPLAN:

7 Q. Ms. Shoshone, why did you create this second account?

8 A. To follow Jason Rapert.

9 Q. I'm sorry?

10 A. To follow Jason Rapert, to follow Senator Rapert on
11 Twitter.

12 Q. And do you use it any differently than you do that original
13 account?

14 A. No.

15 Q. That's all.

16 THE COURT: Anything further, Mr. Bird?

17 MR. BIRD: Nothing further.

18 THE COURT: Mr. Byrd?

19 MR. BYRD: No, Your Honor.

20 THE COURT: May this witness step down and be excused?

21 MR. BIRD: Yes.

22 THE COURT: You may. Thank you.

23 MR. KAPLAN: I have one additional witness, Your
24 Honor, Robert Barringer.

25 THE COURT: Why don't we go ahead and just take a

1 short break. I'm sorry, Mr. Barringer, to do that to you. But
2 I think it will be better to break now to give our court
3 reporter a break.

4 We'll be in recess for ten minutes. We'll come back in
5 here at 10:15.

6 (Recess at 10:05 a.m.)

7 REPORTER'S CERTIFICATE

8 I certify that the foregoing is a correct transcript from
9 the record of proceedings in the above-entitled matter.

10 /s/Elaine Hinson, RMR, CRR, CCR
11 United States Court Reporter

Date: January 20, 2019.

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Elaine Hinson, RMR, CRR, CCR
United States Court Reporter

1 (Proceedings continuing in open court at 10:19 a.m.)

2 THE COURT: Mr. Kaplan, you may call your next
3 witness.

4 MR. KAPLAN: Thank you, Your Honor. Robert
5 Barringer.

6 THE COURT: Mr. Barringer, if you'd please raise
7 your right hand, Ms. Washington will administer the oath.

8 **ROBERT BARRINGER, PLAINTIFF, DULY SWORN**

9 **DIRECT EXAMINATION**

10 BY MR. KAPLAN:

11 Q Good morning, Mr. Barringer. Tell me your name and your
12 address, please.

13 A My name is Robert Barringer. I live at 3700 Gina Drive
14 in Conway, Arkansas.

15 Q Are you a constituent of Senator Rapert?

16 A Yes, I am.

17 Q And obviously you are -- are you a resident also of
18 Faulkner County?

19 A Yes.

20 Q And how long have you lived there?

21 A At this particular address, about three years.

22 Q How about your education?

23 A Went to UCA for a year, went to -- the Army taught me
24 Russian and how to be a signals intelligence analyst, went to
25 UAF a couple semesters, and when I came back to Arkansas, I got

1 an associate's degree in surveying.

2 Q Are you employed now?

3 A Yeah.

4 Q What do you do now?

5 A I'm an Uber driver.

6 Q Are you a supporter of the American Atheists
7 organization?

8 A Yeah. They generally do good things.

9 Q Do you use social media?

10 A Oh, yeah.

11 Q What forms of social media do you use?

12 A Facebook. Just pretty much exclusively Facebook.

13 Q And do you interact with Senator Rapert on Facebook?

14 A I used to.

15 Q And when you say used to, why don't you now?

16 A I can't comment or like anything on his page anymore or
17 react in any way.

18 Q When you were able to comment on his page in response to
19 his posts, did the fact that you were a constituent lead to any
20 particular designation on when you did?

21 A Right, I made sure to set it up so that whenever I'm on
22 his page or any other, like Tom Cotton or French Hill, when I
23 comment on their pages, it's got a logo showing that I'm a
24 constituent.

25 Q Can you describe for the Court what happened that you are

1 no longer -- well, first, let me ask you, you've already said
2 Senator Cotton, that you comment on his page. Any others?

3 A French Hill, Tom Cotton. But I don't comment on theirs a
4 whole lot. They're not nearly as active as Senator Rapert is,
5 so I used to comment on his stuff a lot, but not so much on
6 their pages, just occasionally.

7 Q And can you describe for the Court what happened that you
8 are now unable to access his Facebook page?

9 A He was talking about enacting a new bill for the state of
10 Arkansas to restrict abortions more. And he said something
11 about, you know, all good Christians need to vote for this and
12 call your senator and get this bill passed. So I commented on
13 there that, you know, don't believe people that tell you that
14 God is against abortion or the Bible is against abortion. Here
15 are God's instructions on how to conduct an abortion, and then
16 I linked, "The Test For An Unfaithful Wife."

17 Q What happened -- when was this?

18 A Two years ago or more, maybe three.

19 Q And what happened after you commented in that fashion?

20 A Usually when somebody comments under you, you kind of get
21 a notification or people react to your comment, you got
22 notifications, and I noticed shortly after that, I wasn't
23 getting any kind of notifications on it so I eventually went
24 back to his page and noticed that I was now blocked.

25 Q Okay. And have you since then attempted to access

1 Senator Rapert's page?

2 A Yeah, I tried yesterday. I still can't comment on
3 anything he posts.

4 Q Why do you want to have continuing access to his Facebook
5 page?

6 A Well, couple reasons. I guess the first reason is I
7 really like seeing and trying to understand what other people's
8 positions are, why do they want to enact these policies or laws
9 and what is their motivation behind that, what is their
10 reasoning. And if I can engage somebody in a discussion about
11 why do you want this this way and then I can begin to
12 understand what -- you know, maybe there is a good reason that
13 they're trying to push this policy.

14 And then another thing is I can also try to educate the
15 people about -- that don't have good reasons to support a
16 policy about -- like when Senator Rapert was posting about
17 getting God put back into schools, I felt that was extremely
18 disingenuous and he was misinforming his constituency and other
19 people, as a government representative, about what their rights
20 are, so I was trying to educate the people that followed him
21 and looked at his thread, what their rights were and that if
22 their child is being told that they cannot pray in school, then
23 they need to -- there are plenty of people that would be more
24 than happy to represent them and sue the heck out of that
25 school, or at least get them a letter so that their child could

1 now pray in school.

2 Q When was this?

3 A That was right after I first moved to Conway, I think. I
4 think that was like three or four years ago.

5 Q Can you now see his Facebook page?

6 A I can see it. I can see what he posts and I can see what
7 other people comment, but I can't react, like, angry face or
8 anything like that on any of his posts and I can't comment.

9 Q When you went on yesterday, does Senator Rapert's page
10 still invite comments from the public to his page?

11 A Oh yeah. The rest of the public, but not me, and plenty
12 of other people that he's blocked.

13 MR. KAPLAN: That's all I have, Your Honor.

14 THE COURT: All right. Cross-examination.

15 CROSS-EXAMINATION

16 BY MR. BIRD:

17 Q Good morning, Mr. Barringer.

18 A Morning.

19 Q The complaint says that you viewed Senator Rapert, the
20 Senator Jason Rapert Facebook page in roughly 2015. I think
21 your testimony a minute ago that it was two, maybe three years
22 ago is --

23 A That would be 2015 if it was three years ago.

24 Q I'm representing to you that's what the complaint says
25 and I understand that plaintiffs don't always draft the

1 complaints, that's what lawyers do, so is it accurate do you
2 believe that it was sometime in 2015 when you first started
3 viewing his page?

4 A It could have been earlier than that. I know at some
5 point, like I moved to Conway and then I moved back to
6 Plumerville, and then I moved back to Conway. I know it was
7 either the first time I moved to Conway or the second time I
8 moved to Conway that I first became a follower of his page and
9 Senator Tom Cotton and French Hill. That's when I started, I
10 guess, realizing I need to pay attention to the politics.

11 Q As you sit here today, you're not sure exactly when you
12 began viewing that page?

13 A Correct, yeah.

14 Q As you sit here today, you're not exactly sure when the
15 exchange took place that you describe in the complaint,
16 correct?

17 A Correct. I know I was following his page for about three
18 months before I got blocked.

19 Q As you sit here today, you're not exactly sure when you
20 were blocked from that page, are you?

21 A Correct. I couldn't tell you the day.

22 Q There's an allegation in the complaint, paragraph 64,
23 that alleges that Jason Rapert uses staff to maintain his
24 social media accounts. You don't have any personal knowledge
25 of whether that's true or not, do you?

1 A Not that I could swear to, no.

2 Q Are you aware that Jason Rapert doesn't have any staff as
3 a Arkansas state senator?

4 A So -- no, I was not. So you're saying the senator has no
5 secretary or any other staff at all?

6 Q I'm just asking if you're aware of the staffing situation
7 with the Arkansas state senate.

8 A No.

9 Q Or Senator Rapert.

10 No further questions, Your Honor.

11 BY MR. BYRD:

12 Q Hi, Mr. Barringer. I'm Paul Byrd. How are you?

13 A Good. Nice to meet you.

14 Q Are you saying you haven't had any Facebook interchange
15 with Jason Rapert since last October?

16 A I may have seen him post on news articles like under
17 THV-11 or some other thing, and then I might be able to respond
18 to him there, but I cannot post in his official -- I don't get
19 to show off my constituency label under THV-11.

20 Q Did you have an interchange with him where he asked you,
21 "Robert Barringer, sir, are you the same Robert Barringer that
22 is named in the lawsuit as a plaintiff against me"?

23 A Yes.

24 Q Did you respond to that?

25 A I may have, yes.

1 Q You said, "Yes, I sure am"?

2 A Yes.

3 Q And that's been since the last lawsuit was filed in
4 October?

5 A Right. But, again, that was not on his page, and I don't
6 even remember if that was his senator profile or if that was
7 his personal profile. And he tends to -- he has, like, four
8 profiles. He obviously wants to keep his government separate
9 from his personal life separate from his ministry and separate
10 from his other organization, Keeping Judeo-Christian Values in
11 Government.

12 Q Thank you for that. So in that quote, you said when
13 people quote you, your tweets -- or your tweets, they aren't
14 lying when people quote the Bible that disagrees with you, they
15 aren't lying. Do you remember that whole discussion you had
16 with him?

17 A Talking about the one that got me blocked?

18 Q I don't know. This is you talking to him about the worst
19 part is you make announcements --

20 A Oh, oh, that's right, because he had said that the
21 American Atheists are trying to silence him. He was speaking
22 on behalf of me as my representative and he was saying that I
23 was lying or that I wanted to silence him, which is not true in
24 any way, shape or form. I don't want to silence him, so that's
25 a lie. He's misrepresenting what I want.

1 Q So he has just as much rights as you do?

2 A Yes.

3 Q But you have been able to talk to him on Facebook?

4 A Not on his page, no, but yes, I have responded to him in
5 other pages.

6 Q Okay. Thank you very much.

7 MR. KAPLAN: No redirect, Your Honor.

8 THE COURT: May this witness step down and be
9 excused?

10 MR. BIRD: Yes, Your Honor.

11 THE COURT: Mr. Byrd?

12 MR. BYRD: Yes, Your Honor.

13 THE COURT: You may step down and you're excused.
14 Thank you, Mr. Barringer.

15 MR. KAPLAN: That concludes the testimony, Your
16 Honor. I have marked as Exhibit 16 a document which I have
17 provided to counsel and I'll show the Court.

18 THE COURT: All right.

19 MR. KAPLAN: Your Honor, Exhibit 16 is a listing on
20 the left side of paragraphs in the complaint and they are
21 identified as either relating to Facebook or relating to
22 Twitter, and then the column immediately to the right of that
23 identification demonstrates what that paragraph talks about.
24 For example, paragraph 20, verification; 21, status updates;
25 23, friending. And then on the right-hand side where it says

1 link are the URLs to each of those paragraphs and items such as
2 verification or blocking or friending. And if one were to go
3 to those URLs, they would support the allegation in the
4 complaint and would allow whoever is looking at that URL to see
5 the derivication (sic) -- derivation of the allegation in the
6 complaint. And we would offer No. 16.

7 THE COURT: Any objection?

8 MR. BIRD: Your Honor, with regard to Exhibit 16, we
9 are going to object to 16 on the basis that we had not seen
10 this list prior to this morning. We have not reviewed these
11 links. We don't know if these links are consistent with the
12 allegations in the complaint as they present these. To the
13 extent that the plaintiffs are seeking to offer into evidence
14 the substance that's behind these links, different from just
15 this page of links, we would object on that basis.

16 THE COURT: Do you have a response, Mr. Kaplan?

17 MR. KAPLAN: Your Honor, I believe that these are
18 totally noncontroversial items. It is early in the proceeding,
19 and when and if there are further discovery or hearings in this
20 matter, I think it would be easy to provide a book with each of
21 the links themselves, that is, the hard copy of the link, and
22 this is merely an attempt to assist the Court if the Court had
23 some question with regard to, for example, users and nonusers,
24 or in paragraph 55, blocking; 56, blocking; 57, blocking, the
25 Court can go to the URLs for 56, 57, and 58 and satisfy itself

1 with regard to what Twitter says with regard to blocking. This
2 is an attempt to assist the Court at this very early stage of
3 the proceeding. And I don't think it prejudices the other
4 side. They have knowledge now of each of these URL links.

5 THE COURT: All right. I'm going to receive 16 at
6 this stage. And I've said it many times in writing, so it's
7 not a surprise. I believe I can consider lots of things at
8 this stage of the preliminary stage. I will always ask for and
9 weigh objections in regard to it. I will accept it and review
10 it for what I understand it to be offered as, which is a
11 reference or a resource to Twitter, Facebook, these URLs that
12 the paragraphs are derived from. It may be correct; it may not
13 be correct. I don't know.

14 And I'm sure that that's really the objection I think
15 that the defendant is making that they haven't had the
16 opportunity to verify it or to look at it or to understand what
17 these links are. So I'm open to receiving any other additional
18 counter evidence in regard to it. There's not been a response
19 yet to the motion for temporary restraining order or
20 preliminary injunction. You're certainly welcome to address
21 this issue in that filing, but I'll receive it today.

22 (Plaintiffs' Exhibit 16 received in evidence.)

23 MR. BYRD: Your Honor, just for purposes of the
24 record, I join with the other Mr. Bird's objection.

25 THE COURT: All right.

1 MR. KAPLAN: Your Honor, lastly, I would offer
2 No. 17 which I've also showed to the defendants, which is the
3 affidavit of Nicholas Fish who is the president of American
4 Atheists, Inc., and is offered to demonstrate the position of
5 American Atheists with regard to this proceeding. It really
6 doesn't contain any -- at this early stage, it really just
7 deals with an attempt to bolster standing, and I offer this, I
8 wasn't going to offer it, but I understand that defendants are
9 going to offer the affidavit of Senator Rapert. If his
10 affidavit is admissible, then my position is that the affidavit
11 of Nicholas R. Fish at this stage is also admissible.

12 THE COURT: All right.

13 MR. BIRD: No objection, Your Honor.

14 MR. BYRD: None.

15 THE COURT: I'll receive 17, which is the affidavit
16 of Nicholas Fish.

17 (Plaintiffs' Exhibit 17 received into evidence.)

18 MR. KAPLAN: Your Honor, at this point, Plaintiffs
19 rest subject to whatever evidence the defendants might offer.

20 THE COURT: All right. Mr. Jacobs, do the
21 defendants wish to present any evidence today?

22 MR. JACOBS: Your Honor, the only evidence we'd like
23 to present, as my friend mentioned, a declaration signed by
24 Senator Rapert. Would the Court prefer it to be Defendant's
25 Exhibit 1 or to consecutively --

1 THE COURT: Why don't you do Defendant's Exhibit 1.

2 MR. JACOBS: We provided this to Mr. Kaplan.

3 Defendant will offer this.

4 THE COURT: Any objection, Mr. Kaplan?

5 MR. KAPLAN: No, subject to my ability to
6 cross-examine him at the appropriate time.

7 THE COURT: All right.

8 (Defense Exhibit 1 received in evidence.)

9 MR. JACOBS: So we also had a few -- we had planned
10 on asking initially Ms. Fernau, one of the plaintiffs, about
11 these if she were to testify. Ms. Fernau did not testify
12 today, so we would offer -- we have three e-mail exchanges from
13 Ms. Betty Fernau to Senator Rapert that I believe my colleagues
14 are going to provide. If we could offer these as Defense
15 Exhibits 2, 3, and 4. The first one is -- the top date on this
16 e-mail exchange is February 10th, 2017, from ABFernau@gmail.com
17 to JasonRapert@senateAR.gov. This would be Defense Exhibit 2.
18 Next one, the top date on the e-mail is October 13th, 2016,
19 also from ABFernau@gmail.com to Jason.Rapert@senateAR.gov.
20 That would be Defendant's Exhibit 3.

21 And the last one, top date is December 19th, 2016. This
22 one is just one page and that will be Defendant's Exhibit 4.
23 So we would ask that these be admitted.

24 MR. KAPLAN: Your Honor, my objection is that these
25 all seem to be to Senator Rapert's personal or Senate account

1 but not his either Facebook page or Twitter handle which are
2 the subjects of this proceeding. I know that I could send an
3 e-mail to Senator Rapert or to any senator at Senate.AR.gov.
4 That's not a Facebook e-mail address nor is it a Twitter
5 handle. So I would object on the grounds of relevancy because
6 it doesn't have anything to do with this proceeding.

7 MR. JACOBS: Your Honor, the defendant wishes to
8 introduce those not for that purpose, but to show the reason
9 behind Senator Rapert blocking certain people. In this case
10 it's harassing and potentially threatening e-mails from one of
11 the plaintiffs. That's what that's offered for.

12 MR. KAPLAN: Well, I note that at least on -- I'm
13 reading this for the very first time. On page 2 of the exhibit
14 tendered Exhibit No. 3, there is a communication from somebody
15 named "Star Stuff". It says ABFernau@gmail. "I am requesting
16 that you unblock me from your Senator Jason Rapert page" --
17 which is a relevant item in connection with this proceeding
18 because it refers to his page, his Facebook page -- "that I may
19 participate in discussions where my opinion will be heard."

20 And if you look further up in the chain on October 13th,
21 this was -- what I just read to you was at 2:17, and this is at
22 3:13 on his Senate e-mail, he writes to Ms. Fernau, "If I can
23 help you with an issue, he said, my personal social media sites
24 are private platforms. When anyone attempts to commandeer the
25 sites and spread information and attacks, but not only attacks,

1 but use vulgarities, my campaign and site administrators have
2 permission to" -- and he refers here to his campaign and site
3 administrators, which apparently in his affidavit, he denies he
4 has -- "have permission to delete comments or block someone who
5 repeatedly violates our standards."

6 I note that there is -- on the testimony that we heard
7 today, there's nothing -- none of those three had used any
8 profanity, vulgarity, used anything. And then if you look on
9 page 3 in the morning, that same day, October 13, she wrote to
10 him. It doesn't say where -- to what e-mail address. And she
11 says, "Since you now have me blocked on your personal Facebook
12 profile and your senator page -- so obviously this is to some
13 other e-mail address -- along with Twitter, I suppose I'll have
14 to e-mail you if I need the help of the senator in my district.
15 For the record I have never messaged you anything irate. I
16 commented with Bible verses on your senator page years ago. I
17 will include screenshots below -- which she apparently does --
18 for you to block people you are supposed to represent is
19 extremely low." So I don't see anything here that demonstrates
20 her vulgarity. On Exhibit 4, I think it's the same thing, I
21 don't see anything that would establish what Mr. Jacobs has
22 said it's introduced for.

23 MR. JACOBS: Your Honor, I didn't really catch an
24 evidentiary objection in all that, maybe relevance. I'm sure
25 we can discuss that in a legal argument. I think Mr. Kaplan

1 can see that this is at least irrelevant to the issues in the
2 case since the complaint I think mentions some of these
3 e-mails.

4 THE COURT: Do you want to stand on the relevance
5 objection, Mr. Kaplan?

6 MR. KAPLAN: Your Honor, I objected on the grounds
7 of relevance, but now that I read and have read the documents,
8 I think they support my position so I'm going to withdraw my
9 objection.

10 THE COURT: All right. Are there any other
11 objections to Defense proposed Exhibits 2, 3, and 4?

12 MR. KAPLAN: I'm sorry, Your Honor?

13 THE COURT: Any other objections to 2, 3, and 4 that
14 I need to address before I rule on whether I'll consider them
15 or receive them?

16 MR. KAPLAN: No, Your Honor.

17 THE COURT: I'll receive 2, 3, and 4 offered by
18 defendant.

19 (Defense Exhibits 2, 3, and 4 received in evidence.)

20 MR. BIRD: So defendants would offer this as Exhibit
21 5. So this is just a screenshot, a page of Senator Rapert's
22 personal Twitter account, just sort of an example of the types
23 of things that he posts. So Exhibit 5, we ask the Court admit
24 that.

25 MR. KAPLAN: Well, again, Mr. Jacobs has identified

1 this as his personal Twitter account and that's different than
2 his Senator Rapert Twitter account. I have no way of knowing
3 whether this is on Senator Rapert Twitter account or the
4 personal Twitter account. If it's on his personal Twitter
5 account, I would object on the grounds of relevancy. If it's
6 on his Senator Rapert account, I don't have any objection.

7 MR. JACOBS: Your Honor, our position is that all of
8 these are his personal accounts. I'll note that the handle on
9 this is the @JasonRapert account, which it's the defendant's
10 position that this is Senator Rapert's personal account as
11 opposed to @RapertSenate, which he currently uses as a campaign
12 account. I think plaintiffs state in their complaint that that
13 one is a campaign account. But, again, this is a screenshot
14 from the Twitter that this lawsuit or that -- the Twitter that
15 this lawsuit is about, so I don't understand the objection.

16 MR. KAPLAN: Well, this is not about his personal
17 Twitter account. It's about his senatorial account, Twitter
18 account in which he invites his constituents and any others to
19 respond to him about matters of public concern. So if it's on
20 his -- I know that they take the position that he has a
21 personal Twitter account and that they're all the same, but
22 they're not all the same, and that's what this lawsuit's about
23 so I would continue to reassert my objection.

24 THE COURT: I'll recognize the relevance objection,
25 but I'll admit it. I'll consider it at this stage. Admitting

1 it at this stage simply means that I'm going to look at it and
2 make a decision on the temporary restraining order or
3 preliminary injunction question before me. You're not waiving
4 any and all evidentiary objections you may ever have to these
5 documents, but I want to know and understand what your
6 positions are regarding these documents when I'm considering
7 the temporary restraining order or preliminary injunction
8 matters before me.

9 (Defense Exhibit 5 received in evidence.)

10 MR. BRONNI: Your Honor, if I may, just to correct
11 one point. This is the @JasonRapert account which is named in
12 their complaint that they are suing over. I just wanted to
13 make that clear for the Court's convenience.

14 THE COURT: Thank you, Mr. Bronni.

15 MR. JACOBS: That's all the evidence from the
16 defendant, Your Honor.

17 THE COURT: All right.

18 MR. KAPLAN: Your Honor, all I have now is argument.

19 THE COURT: All right. We're going to take a short
20 recess before we get to argument so that both sides can prepare
21 and present it. I want to raise with the parties questions
22 that I don't know that you've talked to one another about.
23 This request is posed as a temporary restraining order and
24 preliminary injunction. Clearly different things flow from
25 those. A temporary restraining order under the rules is 14

1 days unless I extend it for good cause or unless the other side
2 agrees. The inquiries are not that different. Typically in my
3 court, what I've done is considered a temporary restraining
4 order when the defendants haven't had the opportunity to fully
5 contest or respond to the issues.

6 That's somewhat the position we're in today. We're sort
7 of in a mixed position, I would say. I don't have briefing and
8 there are clearly legal issues that are involved in this case.
9 I do have some evidence and some exhibits. We've had the
10 opportunity to talk and discuss those. So I don't know if the
11 parties -- it's up to the plaintiffs really if you want me to
12 consider it as a temporary restraining order or preliminary
13 injunction combined. Or I want to hear from both sides
14 basically of where you think we're at in the federal rules of
15 civil procedure today. And keeping in mind, I know we
16 discussed having this hearing later in the month, having this
17 hearing next month, and talking about all of those dates.

18 So I don't know your calendars. I know the 14 days is
19 what is triggered by a temporary restraining order. A
20 preliminary injunction, the duration is different. I haven't
21 made my mind up one way or the other, so by saying those
22 things, I'm not saying I'm going to enter one or deny one. I
23 just want to, while we're all here today, to hear from Counsel
24 about where you think we are procedurally in this case. With
25 that, we'll take a break. We'll come back in at five after 11.

1 I'll hear argument, and then at the end of the argument we'll
2 take up these procedural issues. We're in recess.

3 (Recess at 10:54 a.m. until 11:06 a.m.)

4 THE COURT: Mr. Kaplan, you may proceed with
5 argument.

6 MR. KAPLAN: May it please the Court. We know that
7 we have to demonstrate irreparable harm. The irreparable harm,
8 in connection with constitutional matters, is different. Even
9 a short period of time constitutes irreparable harm. In our
10 brief, we cite *Elrod v. Burns*, 427 U.S. 347. It's a case
11 that's been around since 1976. And this deprivation, even
12 though some of the blocking took place as long as three years
13 ago, it's clear, and each of the plaintiffs have testified that
14 they either today or yesterday went on either Twitter or
15 Facebook and they remain blocked from commenting and
16 participating in the thread.

17 And the legislature, the Arkansas legislature, began its
18 session yesterday and so this is a particularly auspicious and
19 appropriate time to deal with this that they are in session
20 now. We recognize obviously that matters of public concern
21 continue even after the session, either 60 to 90 days is over,
22 committees meet on a regular basis. And politicians, public
23 officials, senators, representatives in the Arkansas General
24 Assembly continue to deal with matters that engage the public
25 and that are crucial to the continued viability of this

1 society. So with regard to irreparable harm, although the
2 plaintiff -- the defendants say, well, look, some of these
3 things happened years ago and they knew that they were being
4 blocked and they didn't take immediate action. One doesn't
5 have to take immediate action.

6 Particularly with regard to the original lawsuit that was
7 filed here, unfortunately counsel did not act in an appropriate
8 and timely manner. But as soon as we got involved, this firm
9 got involved, we immediately took action to remedy that
10 situation. We filed the nonsuit to make certain that the issue
11 with former counsel did not linger on. And we refiled together
12 with, almost immediately just within a day or two, the request
13 for the extraordinary relief. So I think that it's clear that
14 under the constitutional issue with regard to irreparable harm,
15 that it has long been established that even a very brief
16 deprivation of a constitutional right constitutes irreparable
17 harm.

18 With regard to the likelihood of success on the merits,
19 it's clear that his posts provide information and give
20 opinions, invite discussions. I think that the Court can take
21 judicial notice of his Twitter and Facebook, his Facebook page
22 and his official Twitter account both of which have an
23 invitation on them to members of the public and to his
24 constituents to post. So it's clear that this is in his
25 official position as senator. If there was any clearer

1 exposition of this issue raised by the motion to dismiss in the
2 individual capacity, what the Fourth Circuit says in *Davison*
3 *against Randall* decided on January 7, just a week ago -- and
4 it's Fourth Circuit Case No. 17-2002, they said -- and this is
5 at page 18 of the slip opinion.

6 "Although no one factor is determinative, this court has
7 held that a defendant's purportedly private actions bear a,
8 quote, sufficiently close nexus, closed quote, with the State
9 to satisfy Section 1983's color of law requirement when a
10 defendant's challenged, quote, actions are linked to events
11 which arose out of his official status, period, closed quote."
12 When a defendant's status as a public official enabled, in this
13 case, her, to execute a challenged action in a matter that a
14 private citizen never could have, then the action is also more
15 likely to be treated as attributable to the State.

16 Going on, at page 19, "This court has found that a
17 challenged action by a government official is fairly
18 attributable to the state when, quote, the sole intention,
19 closed quote, of the official in taking the action was, quote,
20 to suppress speech critical of his conduct of official duties
21 or fitness for public office." So what we're talking about
22 is -- and then lastly at page 20, "A private citizen could not
23 have created and used the chair's -- she was a chair of a
24 county commission, a county board -- I'll start again. This is
25 Randall in *Davison v. Randall*. "A private citizen could not

1 have created and used the chair's Facebook page in such a
2 manner. Put simply, Randall clothed the chair's Facebook page
3 in the power and prestige of her office and created and
4 administered the page to perform actual apparent duties of her
5 office."

6 And I think when you look at his Facebook page and
7 particularly you'll see that it began as a campaign item and
8 the history of the page will show right on it that it changed
9 to Senator Jason Rapert's page as soon as he got elected, that
10 this is an official page in which he invites people, he has
11 commented on legislation before the Arkansas General Assembly,
12 commented on his effort with regard to have the monument to the
13 ten commandments placed on the Capitol grounds. So I think
14 that it is -- it's clear that this is an action, these are
15 actions taken under color of law. And the Exhibits 7 and 11
16 introduced through the testimony of Karen Dempsey and Cathy
17 Shoshone make it clear that these are taken under color of
18 state law.

19 And the law is now clear, the case, Knight First
20 Amendment Institute at Columbia and others against President
21 Trump, Hope Hicks, Sarah Sanders, and Daniel Scavino, in a
22 memorandum decision of the United States District Court for the
23 Southern District of New York made it clear in an extensive
24 75-page well-reasoned decision that these accounts, Facebook
25 pages, and Twitter accounts, are public fora, and it would

1 be -- it's inconceivable to me that anybody could deny that
2 they are public fora.

3 With regard to the third factor, harm against an adverse
4 party, there's certainly no harm in requiring that Senator
5 Rapert make available his Facebook page and his Twitter account
6 to all comers. There's no indication that these plaintiffs had
7 any -- did anything to violate his terms of use with regard to
8 those accounts. They merely say that -- or presented points of
9 view which were clearly contrary, I guess about 180 degrees
10 contrary to those that he has taken. He claims in his
11 affidavit that these folks aren't blocked. Well, we had hoped
12 that he would be here. He says in his affidavit also that he's
13 a part-time legislator. Well, I know it's about 20 blocks from
14 the State Capitol to come down to hit Capitol and Broadway, but
15 there's certainly no reason why he could not have come and
16 defended himself, but clearly these people have been blocked.

17 They were blocked as of yesterday and as of this morning,
18 and the fact that he claims in one place that he doesn't have
19 any staff, and in another in response to Ms. Fernau, alludes to
20 his staff, indicates, I think, clearly to the Court that
21 there's something awry here, and that that would not be in
22 terms of the impact on people who want to communicate with him
23 as opposed to his having to listen to adverse points of view, I
24 guess even though he might not -- he doesn't have to read them,
25 I mean, they get there, but he doesn't have to read them, but

1 the important thing is that they're part of this chain of
2 discussion with the public that he invites.

3 And, that should he choose to ignore them, okay, he
4 chooses to ignore them. There are lots of politicians who
5 ignore what either their constituents or other members of the
6 public have to say. But it's a far different thing to say,
7 "I'm going to ignore them" than to say "You can't even approach
8 me, you can't even come with your comments to this public page
9 that I have created." And that clearly implicates the fourth
10 point, the public interest requirement, the enforcement of the
11 First Amendment of free speech rights is always in the public
12 interest and in support of a robust public debate.

13 So with regard to each of the four foundations of a
14 request for extraordinary relief, I would urge the Court that
15 the plaintiffs have made out their case both with regard to or
16 each with regard to irreparable harm, the likelihood of
17 success, harm against an adverse party, or that is the
18 balancing of the equities test, and the public interest test.

19 If the Court wants to hear our position now on whether
20 this should be considered to be only on the TR0 or the
21 preliminary injunction also, I can state our position there
22 too.

23 THE COURT: Why don't we hold that, Mr. Kaplan.
24 We'll have that discussion after we talk about the merits.

25 MR. KAPLAN: Sure. Thank the Court for listening.

1 THE COURT: Thank you. Mr. Jacobs.

2 MR. JACOBS: Thank you, Your Honor. Jason Rapert is
3 a civic-minded private citizen, a small business owner, and an
4 ordained minister. Like most Americans, he uses social media
5 as a platform to discuss things that are important to him
6 including politics and sharing his faith. And like most
7 Americans with large social media followings, Defendant is
8 forced to exercise his control over the content that appears on
9 his profiles including blocking and banning users who violate
10 the rules that he has laid down.

11 This case concerns two social media accounts, in
12 particular: A Facebook page and a Twitter account. The
13 plaintiffs, the individuals at least, have been blocked or
14 banned from one of these social media profiles for abusing the
15 privilege of accessing them. They claim that this violates
16 their First Amendment rights, but they have no First Amendment
17 right to access anyone's personal social media profiles
18 including Senator Rapert's. We are only here because in
19 addition to being a small business owner and ordained minister,
20 Jason Rapert is a member of Arkansas's part-time legislature.

21 Plaintiffs claim that because Jason Rapert is a state
22 senator, he is robbed of his ability to manage his social media
23 accounts, but even more startling than that, Plaintiffs ask
24 this court to issue a prior restraint on his ability to discuss
25 his religion on these private pages. That would clearly

1 violate his First Amendment rights to express his religious
2 beliefs, and such a request is totally improper. That is
3 perhaps the reason I haven't heard Plaintiffs make any remarks
4 about that today. But in order for Senator Rapert's social
5 media profiles to be subject to the First Amendment, two tests
6 must be met. First, Senator Rapert has to be acting under
7 color of state law when he creates and manages his social media
8 accounts and curates the content and permissions for those
9 accounts; and, second, his social media profiles must be a
10 public forum.

11 On the record before this court now, Plaintiffs did not
12 come close to being able to prove either of these things. This
13 is because his social media accounts are controlled by
14 Defendant in his capacity as a private citizen. And if I could
15 direct the Court's attention to the affidavit that Defendant
16 filed today as Exhibit 1, he provides a description of these
17 accounts. So one of these is a Facebook page which was
18 launched during his first senate campaign, and the original
19 caption of this page was "Jason Rapert For Arkansas Senate,"
20 and he testifies under oath in his affidavit that this is
21 solely managed by him, he's never had any government staff
22 managing this page, and the most obvious reason is that he does
23 not have government staff who work under him to manage the
24 page. He testifies that during campaign seasons, he has on
25 occasion provided his campaign staff with access to his social

1 media accounts and allowed them to assist in managing, but
2 never any official government staff.

3 So a Facebook page -- Plaintiffs agree with some of these
4 in their complaint. A Facebook page is different from a
5 Facebook profile or account in that it allows for greater reach
6 of an audience. So a Facebook account, which most individuals
7 have, only allows 5,000 friends, you can post to these friends.
8 Anybody can create a Facebook page which allows an unlimited
9 number of followers that a person can post and share their
10 thoughts with. And so turning to paragraph 7 of this exhibit,
11 the defendant has put a screenshot of the current impressing
12 some of the rules of the Senator Jason Rapert or @JasonRapert
13 Facebook page, and it reads that "Anyone who engages in
14 bullying, intimidation, personal attacks, uses profanity or
15 attempts to mislead others with false information will find
16 their privileges to post on this page revoked. Thank you for
17 respecting others. This is not paid for or administered by a
18 government entity."

19 On Twitter, similarly, the account at issue is a personal
20 account of Senator Rapert's. It's the @JasonRapert Twitter
21 handle. This is the only personal account on Twitter that
22 Senator Rapert has. He doesn't have an official government
23 Twitter account. He has the @JasonRapert handle and he also
24 has the @RapertSenate handle, which is his campaign account.
25 And I believe from their complaint, Plaintiffs agree that

1 @RapertSenate is a campaign account. And the plaintiffs aren't
2 challenging anything that Senator Rapert has done on this
3 account. The @JasonRapert Twitter account, like his Facebook
4 page, was created before he was elected to the Senate. And
5 Senator Rapert has continued to use it in the same way as he
6 did before and after being elected to office.

7 The plaintiffs rely on two cases chiefly in asking for
8 injunctive relief. If I could just give a few brief remarks
9 about the stark differences between the case as it sits before
10 Your Honor today. And the case, in those cases, *Davison v.*
11 *Randall* which was decided by the Fourth Circuit this past week,
12 and the *Knight First Amendment v. Trump*, which is a Southern
13 District of New York decision from earlier this year. Both
14 cases resulted in declaratory judgments finding that the social
15 media accounts or activities at issue violated the First
16 Amendment.

17 Both of those cases, I think the most important fact that
18 distinguishes them, involve government staff managing social
19 media accounts. The undisputed testimony in the record today
20 is that is the case. It's never been the case. Senator Rapert
21 manages these accounts personally just like everyone else in
22 this courtroom who has a social media account would do. Both
23 of those cases involved a voluminous record. *Davison v.*
24 *Randall*, which is the Fourth Circuit case that was originally
25 in the Eastern District of Virginia, was a final judgment after

1 a one day bench trial. The Court in that case had hundreds of
2 exhibits before it in analyzing the specific facts of the
3 social media accounts before it. In the *Knight First Amendment*
4 *v. Trump* case, which was resolved on summary judgment, on
5 undisputed facts and stipulations.

6 Importantly, neither of those cases involved injunctive
7 relief and, in fact, both courts, the district court in the
8 Fourth Circuit case and the Southern District of New York, both
9 declined to grant injunctive relief to the plaintiffs in that
10 case despite finding for them on the First Amendment
11 declaratory relief. So the plaintiffs here are asking for
12 relief that neither of those two cases stand for.

13 So if we turn to the legal issues, the first being the
14 state action requirement, in order to maintain a lawsuit under
15 1983 for a constitutional violation, the defendant must have
16 been acting under color of law. And the Eighth Circuit has
17 explained this in the *Wickersham v. City of Columbia* case.
18 It's at 481 F.3d 591. The relevant Supreme Court test for that
19 is *Lugar v. Edmondson Oil Company*, 457 U.S. 922.

20 And so to ascertain whether it's a state action in the
21 case, courts look to the record to examine whether the conduct
22 is fairly attributable to the state, and they've asked whether
23 the deprivation or the alleged deprivation resulted from the
24 exercise of a right or privilege of the defendant having its
25 source in state authority and whether the party engaging in

1 that deprivation may appropriately be characterized as a state
2 actor. So the two cases that they rely on discuss this. The
3 first is *Davison v. Randall*, the Fourth Circuit in the Eastern
4 District of Virginia case.

5 The defendant in that case was the chair of the Loudoun
6 County Board of Supervisors. She created a Facebook page that
7 she described as a county page and invited, quote, any
8 constituent to post on the chair page on, quote, any county
9 issues. The Eastern District of Virginia thought was the most
10 important fact in that case, and that isn't the case here.
11 With regard to the Facebook page in particular, only Senator
12 Rapert can post to that page. Senator Rapert is the only one
13 who can make new posts on the page and to initiate discussion
14 on the topics that he wishes to talk about. Others can only
15 comment and reply to comments on the page, which is a critical
16 distinction from the Eastern District of Virginia case. And
17 that court noted eight particular facts that it found weighed
18 in favor of finding that the chair of the board of supervisors
19 acted under color of state law in managing that page and
20 banning the plaintiff from that page for what the Court later
21 determined was viewpoint information. And the facts are quite
22 different here.

23 The only one that is actually the same is the title page
24 included the defendant's title, which is descriptive and not
25 something that the Court there gave much weight to. The page

1 in that case was categorized as that of a government official,
2 so I think the Court can see from several of the first exhibits
3 the plaintiffs introduced about Jason Rapert's Facebook page,
4 that his page is categorized as a politician. So this is the
5 same as President Obama and former Governor Mike Huckabee.
6 They were also listed as politicians. This is different from
7 holding out this Facebook account as someone who is a
8 government official, which was the case in the Eastern District
9 of Virginia Fourth Circuit case.

10 The district court noted that the Facebook page at issue
11 there listed the contact information as the defendant's county
12 e-mail address, the telephone number of county office. We
13 looked to the plaintiffs' exhibits that they introduced. The
14 contact website is Senator Rapert's campaign e-mail or, sorry,
15 campaign website. He doesn't have an official office like that
16 to have a phone number for on there, so again, very different.
17 The posts, the district court found in that case, were
18 expressly addressed to Loudoun or citizens of Loudoun. You can
19 see from the exhibits that the plaintiffs introduce that
20 Senator Rapert doesn't begin his addresses that way. He posts
21 and shared posts in his personal capacity as a citizen as
22 anyone else might.

23 The defendant in that case submitted posts on behalf of
24 the board of supervisors as a whole. Senator Rapert does not
25 purport to post on behalf of the legislature as a whole. The

1 defendant in that case specifically asked her constituents for
2 back and forth constituent conversations and held the page out
3 as being for that purpose. That's not the case here. As
4 Senator Rapert has put in his affidavit, the rules of the road,
5 the conversations that can be had on there are limited, and
6 followers can only post on the topics that Senator Rapert
7 chooses to post about in the first instance.

8 And the district court noted that it reviewed nearly 100
9 exhibits of posts in that case. I believe we have a few, maybe
10 a dozen exhibits in here about the Facebook page, all about
11 really a single post, so the volume of the record here is
12 striking lack of evidence, and the district court noted in that
13 case that nearly all of the posts on that Facebook page related
14 directly or indirectly to Defendant's public office. A quick
15 perusal of Senator Rapert's Facebook page or Twitter accounts
16 will show that's not the case. He frequently posts about
17 politics in general, various local, state, and global issues,
18 he posts about his religion, about his ministry, about his
19 business. It's clear that this is not held out as an official
20 account in the same way that the account in *Davison* would.

21 And the Court specifically held in that case, and this is
22 at page 7 of the Fourth Circuit's opinion, that a private
23 citizen could not have created and used the chair's Facebook
24 page in the manner that it did. Put simply, the defendant
25 clothed that Facebook page in the power and prestige of her

1 government office and created and administered that page to
2 perform actual or apparent duties of her office. So that's
3 wholly findings on a voluminous record by the district court
4 that the Court found supported that conclusion. So the Fourth
5 Circuit in the district court in that case had before it a very
6 different record, and contrary to the bench trial that was in
7 that case, we have very scant evidence in terms of the content
8 of Senator Rapert's social media accounts. We have a few posts
9 from his Facebook.

10 I believe the only evidence Plaintiffs introduced at all
11 about Senator Rapert's Twitter account are some replies such as
12 in Exhibit 15 where he's replying on someone else's page. And
13 the defendant introduced, I believe it was Exhibit 5, which is
14 the only tweet from Senator Rapert in the record at this point,
15 I believe, where Senator Rapert tweets on November 10th, "Hope
16 all my deer hunting buddies bagged a nice buck this morning.
17 Be safe in the deer woods in Arkansas this weekend." And then
18 further down, he says, quote, "Never be afraid -- never ever be
19 afraid to speak the truth and oppose those who are evil.
20 Silence in the face of evil is itself evil. I will always
21 oppose evil locally, nationally, and globally. I'm committed
22 to true justice and liberty." And at the end of it, he
23 references Psalm 56:11. These are the only two tweets that are
24 in the record before the Court at this moment. That's in stark
25 contrast to the hundreds of pages of exhibits that the circuit

1 court reviewed in *Davison v. Randall*.

2 And, finally, even upholding that conclusion, Judge
3 Keenan, who fully joined the majority opinion in *Davison v.*
4 *Randall*, set out in a separate concurrence that she had doubts
5 about whether a public official serving in a legislative
6 capacity even qualifies as a unit of government or governmental
7 entity for purposes of a person's ability to open a public
8 forum in the first place, and noted that this is a substantial
9 open question. So if Plaintiffs are claiming that *Davison v.*
10 *Randall* and the Fourth Circuit is what decides this case, the
11 judges in that case didn't even think that was the case and at
12 least one of them expressly disclaimed it. So we can see from
13 just a quick perusal of Senator Rapert's social media accounts
14 that he doesn't purport to act as a government official in
15 tweeting or in posting on Facebook.

16 He posts about a variety of topics, the same topics that
17 he's posted about since before becoming an elected official,
18 and one would think the same topics that he posts after leaving
19 office. There's no difference. It's an entirely different
20 situation than a county page that was dedicated to county
21 business, which is what the district court in *Davison* found and
22 which the Fourth Circuit upheld on that record. So there's
23 simply no evidence in the record from which the Court could
24 conclude that Senator Rapert's acting as a state actor when he
25 tweets, when he posts on Facebook, or when he curates the

1 messages on those accounts.

2 The second requirement is that for the First Amendment to
3 even apply to Senator Rapert's social media accounts, it would
4 have to be a public forum. And as the Supreme Court explained
5 in *Cornelius v. NAACP Legal Defense Fund*, which is 473 U.S.
6 788, that case was relied on by *Davison v. Randall*, and the
7 Court in *Knight First Amendment v. Trump*, the Supreme Court
8 said in that case, "The government does not create a public
9 forum by inaction or by permitting limited discourse, but only
10 by intentionally opening a nontraditional forum for public
11 discourse." So it's clear from the Supreme Court's case law
12 that a public forum isn't something that someone
13 unintentionally creates.

14 These accounts were created by Senator Rapert before he
15 ever was in office. They were created for use in his personal
16 capacity sometimes in campaign pages, other times as simply as
17 an individual, and he -- in order for them to qualify as a
18 public forum, you'll have to intentionally open them as such,
19 and there's no evidence from which this court could conclude
20 that he did so. So in the *Davison* case, for example, the key
21 fact was that the defendant invited -- she invited for any
22 constituent to come and talk about any issues they wished to
23 discuss with the chair, and they also make use of government
24 employees in managing the page. It was the chief of staff in
25 that case. In the *Knight v. Trump* case, the key facts the

1 district court found were that The Real Donald Trump Twitter
2 account was registered to Donald J. Trump, 45th President of
3 the United States of America.

4 The tweets from that account were official records that
5 had to be preserved under the Presidential Records Act, and
6 that the account had been used in the course of the appointment
7 of officers including cabinet secretaries, the removal of
8 officers, and the conduct of foreign policy, all of which the
9 district court held were squarely executive functions. And the
10 district court held in that case that the president presents
11 The Real Donald Trump Twitter account as being a presidential
12 account as opposed to a personal account, and more importantly,
13 uses the account to take actions that can only be taken by the
14 president as president. And that was the finding of the
15 district court in that case on a motion for summary judgment
16 after reviewing an evidentiary record. So we don't have any of
17 that here.

18 So Jason Rapert created these accounts prior to being
19 elected to public office, he uses them as a public citizen, he
20 uses them just as any other public citizen does, and he curates
21 the content of those posts just the way that any other public
22 citizen might do. No action that he's taken with regard to his
23 social media is something that he's able to do based on the
24 fact that he is a state legislator. He has no more power than
25 any other private citizen, he doesn't exercise any power when

1 he curates the content of these accounts.

2 And, finally, I didn't hear much from the plaintiffs on
3 this point. There is no evidence on the record before this
4 court that Senator Rapert engages in viewpoint discrimination.
5 So a cursory review of his social media profiles reveals
6 numerous comments and tweets by individuals who disagree with
7 him. Some of his posts garner hundreds if not thousands of
8 comments, and dozens and maybe hundreds of these are people who
9 are criticizing Senator Rapert for various reasons. Those
10 posts are still there, he hasn't banned them. He doesn't ban
11 everyone who disagrees with him. He bans people for violating
12 the rules that he set down. People who are respectful and
13 avoid harassing and derogatory language, they're not blocked,
14 not banned, it doesn't matter what their views are.

15 And on their free exercise claims which I also didn't
16 hear a lot from the plaintiffs, there's no evidence that
17 Senator Rapert blocks people because they're atheists. He
18 explains in his declaration at paragraph 13 that he uses his
19 social media accounts to share ideas on a multitude of topics
20 and as a tool of his ministry sharing his Christian faith. He
21 says, quote, "As far as I am concerned, I am grateful for every
22 atheist or other nonbeliever who follows my social media posts
23 because they present an opportunity to share my faith. I would
24 never ban or block someone from social media merely because
25 they do not share my faith, end quote."

1 So the undisputed testimony today is that Senator Rapert
2 has not engaged in viewpoint discrimination on the stand today.
3 The plaintiffs admitted they don't know of a reason, the state
4 of mind leading to the reason that they were blocked. In
5 certain instances there were many days between the last post
6 that some of the plaintiffs made before the time that they were
7 blocked. We don't have any evidence as to what happened in the
8 meantime, as far as at least Mr. Barringer is concerned, I
9 don't believe we actually have the content of the posts in the
10 record that he says resulted in him being blocked from
11 Facebook.

12 So to sum up the merits, this court simply doesn't have
13 the evidentiary record before it to say that even if it were
14 possible that Senator Rapert acted in a state capacity when he
15 manages the social media accounts, and there's no evidence from
16 which the Court can conclude that his social media accounts are
17 public forum, so for that reason, Plaintiffs don't have a First
18 Amendment right to access or post to his social media accounts
19 and they're unlikely to succeed on the merits of the case.

20 Plaintiffs' claim of irreparable harm is laughable in
21 light of their own conduct. So to start, several of the
22 plaintiffs have been blocked from the defendant's social media
23 profiles for years before they decided to file this lawsuit.
24 When they originally brought this lawsuit, they could not be
25 bothered to serve their complaint within the 90 days allowed

1 under the federal rules. They didn't ask for injunctive relief
2 with that first complaint. They waited months and months and
3 only upon refiling their lawsuit did they ever ask for
4 injunctive relief. And the Eighth Circuit's held that's reason
5 enough to deny injunctive relief altogether.

6 Finally, as to the scope of an injunction which
7 highlights the evidentiary concerns, we don't have any evidence
8 from one of the plaintiffs as to the posts that they claim led
9 to them being blocked. We have allegations of a complaint.
10 And so no matter, I think, how the Court feels about the law in
11 this case or the evidence for the other plaintiffs at the very
12 least, there cannot be a likelihood of success for her.

13 Finally, we would ask that if the Court -- we could have the
14 discussion about the TRO or preliminary injunction in a few
15 moments, but if the Court were to enter a preliminary
16 injunction, we would request that the Court stay the order so
17 that we could immediately appeal that because of the First
18 Amendment issues that are involved.

19 The status quo supports that. They're asking for
20 injunctive relief to overturn a status quo that has been in
21 place for months and for years and have only recently come into
22 court asking for injunctive relief when they could have done so
23 years and years and years and years ago. The defendant would
24 ask that the motion be denied. If this court has any
25 questions.

1 THE COURT: I don't at this time, Mr. Jacobs. I
2 appreciate it. We'll talk about the procedural posture of the
3 case in a few minutes. I'll let Mr. Byrd address the Court if
4 he wishes to do so.

5 MR. BYRD: Thank you, Your Honor. Of course, first
6 and foremost, my position is set out in my brief that an
7 individual can't commit state action to prevent anybody's
8 freedom of speech, but with that motion already there, and the
9 Court will deal with that in due time, I do want to argue in
10 the context of where we are today which is a preliminary
11 hearing, almost emergency hearing with no chance to respond to
12 the allegations really in full advance, so that's where we are
13 today. And there's this tendency, and I kind of hear it in the
14 arguments that we start getting into like lawyers do, we're
15 arguing over some kind of full-fledged case where evidence has
16 been fleshed out.

17 I'm sitting here in a personal quandary. I'm thinking my
18 brother ran for justice of the peace and got on the quorum
19 court, so I'm thinking from the context of what's happening
20 here today, what am I supposed to go tell him? Oh, gosh, you
21 know, you may have just turned your Facebook page into some
22 kind of official something or another. Don't post anything
23 that could look official. And I'm already trying to tell him
24 what he can and can't do, and, like, warn him, and I don't know
25 how.

1 I mean, there's three or four people here that are saying
2 they can't talk to the senator. They've already lived through
3 the session of 2015, the session of 2017, we're sitting here in
4 the session of 2019. Where was the irreparable harm? One
5 gentleman that's testified today got on Facebook and somehow
6 commented to Jason Rapert. Again, I'm trying to figure out how
7 to tell my brother what he ought to do. And what do I tell my
8 brother about when someone gets to the point of it's almost
9 pornographic? What would we do if that kind of post comes
10 along? Is that something that we have to come -- would I have
11 to have my brother come to a court and say, May we block this
12 person? I mean, just seems like at this phase where we're at
13 today, there's just no way to set the ground rules for this.

14 They sued him individually. If he's an individual, then
15 did they know he might be an individual? I mean, is that where
16 we are? It's this gray area of when a Facebook post is going
17 to turn and change, so I guess I'll live in the context of
18 today that we're here for a emergency hearing on a temporary
19 restraining order that someone can't go down and say their
20 piece, you know. It's not far to the Capitol, they can walk
21 down there and go talk to him and write him a note at the door,
22 I guess. That's what I do. But in any event, my real concern
23 is just how to advise my brother when he's become some
24 different kind of animal and has to be careful when he
25 formulates his own opinions and put them out there on the page.

1 Thank you for your time, Your Honor.

2 THE COURT: Thank you, Mr. Byrd.

3 MR. KAPLAN: May I have a brief response, Your
4 Honor?

5 THE COURT: You may.

6 MR. KAPLAN: Your Honor, I'm somewhat baffled by the
7 contrast between what the cases say and how the attorney
8 general interprets those cases, as well as how the attorney
9 general and Senator Rapert construe his efforts. His Facebook
10 page stated that it was, quote, for communication with
11 constituents and citizens as a courtesy. His Facebook page is
12 quite different from another Facebook account, and the attorney
13 general recognizes that. It can have thousands and thousands
14 of participants and likes as opposed to the 5,000 or the
15 smaller limitation on a regular Facebook account. The Facebook
16 account -- Facebook page is different.

17 I don't know how one can continuously assert that he is
18 Senator Rapert and that he has -- and that he posts with regard
19 to legislation not only in the Arkansas General Assembly, but
20 in this nation as a whole and not consider it something other
21 than a personal account. He can have and does have a personal
22 account and has a personal Twitter account, but not the Senator
23 Rapert account. It's pretty clear that those accounts are
24 quite different in character from anything that I can create,
25 that the Court can create, that any other individual can

1 create.

2 And he can have a Jason Rapert minister account, he can
3 have a Jason Rapert financial consultant account or whatever
4 the name of his business is, and those accounts are different
5 in -- totally different in character from what he has and from
6 what is here. The *Davison* court indeed did deny an injunctive
7 relief because the user's account was, or the user was
8 unblocked already, and if one looks at the pages that we have
9 printed in the complaint, you can see that individuals have
10 used obscenities in connection with responses as long as they
11 are in agreement with Senator Rapert. There is -- these four
12 individuals did nothing to indicate that they -- not that I
13 agree that the terms of usage would be constitutional, but even
14 at that, they didn't use any obscenity, they didn't try to
15 create some kind of inappropriate behaviors in responses. All
16 they did was to say that they -- respectfully, to say that they
17 disagreed.

18 So -- and there's nothing to indicate why any of these
19 four people were blocked. And their own -- his own affidavit
20 contradicts what he said in Exhibit 4. He does have an
21 administrator. In his affidavit, he says no. This is so
22 reminiscent of the issues with regard to summary judgment
23 motions where opposing parties later supply affidavits that are
24 contrary to either their deposition testimony or testimony in
25 some prior e-mail where they try to offset and say no, no, no,

1 no, that's not what really happened, ignore my testimony, take
2 my testimony in my affidavit.

3 Well, this court obviously has had that happen, most
4 courts have. And it's pretty clear that you can't change the
5 world by a subsequent affidavit to modify previous accounts and
6 previous testimony as he has tried to do today. I'm looking
7 now at page 21 of the *Davison* opinion. The Court says, well,
8 under long-established First Amendment laws, government
9 entities are strictly limited in their ability to regulate
10 private speech in public fora. And that's in conjunction with
11 Randall's argument that the district court heard in ruling in
12 his favor on his individual capacity First Amendment claim, and
13 the Fourth Circuit makes very short shrift of that as does the
14 Southern District of New York with regard to whether this is a
15 public forum and whether the president's tweets are personal as
16 opposed to some kind of private, nonpublic forum.

17 The evidence, it seems to me, is abundantly clear in this
18 case that we have made out our case under each of the four
19 requisites for extraordinary relief.

20 THE COURT: All right. Thank you, Mr. Kaplan.

21 Let's take up the housekeeping matter that I raised
22 earlier in regard to where we are at procedurally in this case.
23 I will hear from Plaintiffs' counsel first. I'll give everyone
24 an opportunity to address me, and I may have some specific
25 questions for folks as we move through it. Mr. Kaplan.

1 MR. KAPLAN: Your Honor, we are cognizant of the
2 rule that requires, under TRO, 14 days, and be extended to 14
3 days, and if the other side agrees, can we extend it even
4 beyond that. My own personal situation is that I'm unavailable
5 in the month of February, but obviously we have a firm and can
6 remedy that situation if it came to that. We think that the
7 Court can and ought to consider this as a matter for
8 preliminary relief in addition to relief under the
9 extraordinary terms of a temporary restraining order.

10 We think that we have made out that case, and that the
11 Court ought to consider this as both a combined hearing -- we
12 know that it is early in these proceedings, but there's very
13 little additional testimony that would be required with regard
14 to those issues.

15 THE COURT: All right.

16 MR. BRONNI: Your Honor, if I heard Mr. Kaplan
17 correctly, they're okay converting this to a PI. And that
18 would be our preference rather than to just treat these
19 separately. Part of the reason for that, frankly, although I
20 think the Court is going to rule for us on this record, I would
21 say this is an issue that they're actually, I think, for a
22 prior restraint against the minister. Given that context in
23 what they're actually asking for, a preliminary injunction at
24 least gives us the ability to ask the Eighth Circuit for
25 sanctions should we feel this court's decision is in error. So

1 our preference would be to simply skip over the TR0 portion of
2 it and go ahead and move to the preliminary injunction phase.
3 That having been said, one qualification, Your Honor.

4 The rules allow us to file a written response obviously
5 to a preliminary injunction request. Our plan is to file that
6 within the period provided by the rules. I know that they, at
7 least, have requested that the Court shorten that response
8 period. I don't believe there's been any filings back and
9 forth on that point or that the Court's decided otherwise. So
10 we would like that full amount of time, but if Your Honor would
11 prefer to shorten that time to give the Court adequate ability
12 to consider that, we're open to those -- shortening it, but we
13 would certainly like enough time to actually draft that.

14 THE COURT: All right. Have there been any
15 discussions among counsel about that? I know there were a lot
16 of discussions about calendars before we met today, so I didn't
17 know. And if you haven't, you haven't, that's fine, about
18 shortening time.

19 MR. BRONNI: I haven't been involved in that and
20 Mr. Jacobs is telling me no.

21 MR. KAPLAN: I'm sorry, Your Honor. I didn't
22 understand the Court's inquiry.

23 THE COURT: I think what Mr. Bronni suggested is
24 that the plaintiffs asked for me to shorten the response time
25 for the request for preliminary injunction, Mr. Rapert's

1 ability to respond in writing to the request for preliminary
2 injunction.

3 MR. KAPLAN: We have not formally filed anything
4 with regard to request for shortening of time.

5 THE COURT: All right.

6 MR. BRONNI: With that understanding, Your Honor,
7 will Plaintiff file within 14 days unless Your Honor advises
8 them --

9 THE COURT: It's fine to take the 14 days, in my
10 view. What I may do in this case, and I don't know --
11 Mr. Bronni, you don't have to tell me today because your
12 strategy clearly may change as you move through it, if there
13 are evidentiary exhibits attached to the response, I may set a
14 schedule by which the plaintiffs would then need to apprise me
15 of whether you object to any of those exhibits, I give a
16 response time. So that we're clear on what the record is
17 before me that I can consider.

18 MR. BRONNI: Right now, Your Honor, I would advise
19 the Court we're not planning to introduce any evidence. We
20 like this record as it stands.

21 THE COURT: All right. If that changes, I'm not
22 holding you to it today, right? If there are exhibits, we'll
23 deal with them at that point, but I appreciate that. All
24 right. Thank you. Mr. Bird.

25 MR. BIRD: I would just take the same position of

1 Mr. Bronni.

2 THE COURT: All right.

3 MR. BYRD: Your Honor, I'm used to taking
4 depositions and fleshing things out. This is fast and furious
5 for me.

6 THE COURT: I understand. All right. Where I
7 understand us to be, I understand, Mr. Kaplan, your position is
8 that I can consider both a preliminary injunction and a
9 temporary restraining order as one at this point?

10 MR. KAPLAN: Yes, Your Honor.

11 THE COURT: The State has not yet responded in
12 writing to the request, the motion for preliminary injunction
13 and temporary restraining order. They intend to do so within
14 the time provided under the rules. What I intend today is take
15 these matters under advisement. I plan to wait until the State
16 has had the opportunity to file -- the State, Senator Rapert,
17 has had an opportunity to respond in writing, both in his
18 official and individual capacity. I'll assume that that's
19 going to be done by the time set forth under the rules. If
20 there are discussions among counsel that change that, let me
21 know. If I need to look for something later period, that's
22 what I'm most interested in, but otherwise I'll wait until the
23 written response comes in from Senator Rapert in his official
24 and individual capacity and then we'll go from there, I'll take
25 up the issues at that point. If the plaintiffs would like to

1 file a reply brief to that, you may certainly request leave to
2 do it. Typically what I've advised folks of, there's really no
3 provision under the rules until you get to summary judgment for
4 reply briefs. If you want to file one, the most expeditious
5 way usually is to prepare it and ask me for leave to file
6 something that's attached. So that way, things get expedited,
7 I know exactly what that looks like, the other side has an
8 opportunity then to object to the request for leave to file a
9 reply. If there's evidence that comes in with Senator Rapert's
10 response, we'll deal with that as well. I'll ask either side
11 if there are objections or things that I should consider if the
12 record expands either through a response or reply.

13 Are there any questions? All right. If there's no
14 question, I appreciate everyone's time and attention today.
15 Everyone did a good job presenting the issues. They're
16 complicated and weighty issues, but they're interesting issues,
17 as are nearly everything in this court, I will be honest. So I
18 appreciate everyone's work to present it as quickly as you
19 have. Thank you. We're adjourned.

20 (Proceedings adjourned at 12:03 p.m.)

21 REPORTER'S CERTIFICATE

22 I certify that the foregoing is a correct transcript of
23 proceedings in the above-entitled matter.

24 /s/ Karen Baker, RMR, CRR, CCR

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United States Court Reporter

Date: January 22, 2019

Karen Baker, RMR, CRR, CCR
United States Court Reporter